Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC.,

Petitioners,

—v.—

JANE DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In the

Supreme Court of the United States

October Term, 1973

No. .....

Joan Roe, Peter Poe and Coe Press, Inc.,

Petitioners,

—v.—

Jane Doe,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Joan Roe, Peter Poe, and Coe Press, Inc., petitioners herein, hereby respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

Opinions Below

The opinions of the courts below are unreported. The Court of Appeals of the State of New York decided this case without opinion; its amended decision, showing the presentation of a federal question, is set forth in Appendix A, *infra*, at p. 1a; the original decision of that court is set forth at p. 1a. The opinion of the Supreme Court, Appellate Division, First Department, is set forth in Appendix B, *infra*, at pp. 2a-3a. The opinion of the Su-

preme Court, Special Term, New York County, is set forth in Appendix C, *infra*, at pp. 4a-6a.

Jurisdiction

The decision of the Court of Appeals of the State of New York, of which review is here sought, was entered on December 28, 1973; that court's amended decision, revised to show the presentation and consideration of a question under the Constitution of the United States, was entered on February 25, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

Whether the courts below erred in holding that it was not an invalid prior restraint upon freedom of the press, in violation of the First Amendment to the United States Constitution, to grant a preliminary injunction, completely prohibiting the distribution and sale of a concededly truthful, nonobscene book concerning matters of scientific and medical interest and importance.

Constitutional Provision Involved

United States Constitution, Amendment One:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Statement of the Case

This petition seeks review of the extraordinary—indeed, absolutely unprecedented—actions of the courts of the State of New York, which for nearly a full year have enjoined the distribution and sale of a concededly truthful and nonobscene book, concerning matters of great scientific and medical interest and importance.[1] The courts below, it is respectfully submitted, have acted in total disregard of the requirements of the First Amendment, and of this Court's decisions, and have grievously abridged the liberties not only of the petitioners, the authors and publisher of the book, but of countless members of the reading public, lay and professional alike, who are being denied the right to choose what they wish to read.

The facts in this case, insofar as facts have been found at all by the courts below, are set out most fully in the opinion of Supreme Court, Special Term (App. C, *infra*, pp. 4a-6a). The petitioners Roe and Poe (a wife and husband who are, respectively, a psychiatrist and a lay psychotherapist), wrote the book which is here in issue, and it was published by the petitioner Coe Press, Inc. The book, published in February, 1973, is largely a case history of the psychiatric treatment of the respondent, Jane Doe, who was from 1956 to 1963 a psychotherapeutic patient of the petitioner Roe, and of the respondent's late former husband, who during portions of the same period was also a patient of Dr. Roe; the treatment ended over ten years ago.

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[1] Although the injunction is styled as "preliminary" by the courts below, there can be little doubt that it is a final decision, reviewable by this Court under 28 U.S.C. §1257(3), as this Court has construed the latter provision. See pp. 13-16, *infra*.

As the opinion of Special Term reveals, there are seriously disputed questions of fact as to whether the respondent's identity can be determined by a reader of the book, and whether respondent gave permission for publication of the book. Insofar as these factual disputes were resolved at all, they were resolved largely in petitioners' favor.[2]

Nevertheless, after the briefest of hearings, proceeding solely upon affidavits and upon oral argument by counsel, Special Term issued a partial injunction against further circulation of the book, limiting its distribution solely to "scientific and medical" channels, and barring it from "trade press" distribution to the general public. The *nisi prius* court did so although it was totally unable to offer citation of a single precedent, from this Court or any other, in justification of its indeed unprecedented action. Petitioners forthwith appealed to the Appellate Division, First Department; that Court, on the basis of an even obscurer opinion, affirmed the issuance of the injunction, but broadened it so as to prohibit any distribution of the book whatsoever, whether through medical and scientific channels or otherwise. Petitioners again appealed, by permission of the Appellate Division, to the Court of Appeals of the State of New York; once again, the Court affirmed, without discussion of the merits in any way whatsoever.

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[2] Special Term found:

"... defendants have taken some steps to disguise the identity of the patients. I think these steps reasonably met the usual standards for such disguising of patients' identities" (5a), and "... the examples of possible identification given by plaintiff in the moving affidavit must be assumed to be the more striking ones; I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient" (5a).

Although petitioners have sought at every stage to expedite the proceedings in the State courts, in the hope that the requirements of the First Amendment would be recognized and the injunction lifted,[3] distribution of the book has now been enjoined for nearly a full year, since the entry of the order of Special Term on May 7, 1973. If this Court does not review and vacate the actions of the courts below, the injunction will remain in effect throughout the pendency of the trial and appeals of this action, which could well consume a period of years. This Court should not countenance such an egregious abridgment of the precious rights which are guaranteed by the First Amendment.

REASONS FOR GRANTING THE WRIT

Certoriari should be granted because the state court decision below, on an important question of substance of Federal constitutional law, is not in accord with applicable decisions of this Court.

1. It is respectfully submitted that the writ should be granted in this case, because the actions of the courts below stand in direct contravention of over four decades of clear and unequivocal decisions by this Court, that prior restraints upon freedom of the press are presumptively unconstitutional, and that the precious and highly preferred rights which are protected by the First Amendment can be overcome only by carrying the heaviest burden of

[3] The appeal to the Appellate Division was heard on an expedited basis at a special June, 1973 Term of that Court, rather than being held over through the summer recess; on the appeal to the Court of Appeals, a preference was granted upon motion of the petitioners.

justification. There can be no disagreement with the Chief Justice's observation that "... every member of the Court, tacitly or explicitly, [has] accepted the Near and Keefe condemnation of prior restraint as presumptively unconstitutional." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, —— U.S. ——, 37 L. Ed.2d 669, 683 (1973) (Dissenting Opinion). Yet, every day in which the injunction is permitted to stand, is another day in which there continues a presumptively unconstitutional prior restraint on publication.

The central error in the decisions of the State courts, it is respectfully submitted, is expressed in the assumption by Special Term that "... the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure ..." (5a). Such an assumption, of course, is diametrically opposed to the correct analysis of the propriety of imposing a presumptively unconstitutional prior restraint upon freedom to publish; the entire purpose of the free press provision of the First Amendment was to establish, in the organic law of the nation, an overwhelming presumption in *favor* of freedom to publish, and it is not open to the courts of any state to place the burden of justification on the writer or the publisher.[4]

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[4] "As a starting point, one must assume the general principle that under the First Amendment and our notions of a democratic society, freedom of expression is the rule and constraint the exception. ... [T]he ... principle, that only in the most urgent circumstances can a limitation upon freedom of expression be justified, and that the courts, under the First Amendment, have a serious obligation to strike down limitations which do not clearly meet such conditions, is fundamental to any analysis of prior restraint." Emerson, 'The Doctrine of Prior Restraint," 20 LAW & CONTEMP. PROB. 648, 655 (1955). See also Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 503-512 (1970).

Over forty years ago, in *Near* v. *Minnesota,* 283 U.S. 697 (1931), this Court established the principles which must govern in any case of prior restraint; the milestone opinion of Mr. Chief Justice Hughes, writing for the Court, is directly applicable to the present case:

> "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in the renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.' 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889." 283 U.S. at 713-714 (Emphasis in original; footnote omitted).[5]

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[5] Mr. Justice Harlan has explained that the rationale for this special constitutional animadversion to prior restraints is the "social necessity" of freedom of the press in our system. "It is because of the personal nature of this right that we have rejected all manner of prior restraint on publication, *Near* v. *Minnesota* [citation], despite strong arguments that if the material was unprotected the time of suppression was immaterial." *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 149-150 (1967).

Since *Near*, this Court, notwithstanding its changing composition, has been absolutely consistent, to the present day, in holding that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times* v. *United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Freedman* v. *Maryland*, 380 U.S. 51, 57 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). In every one of the latter cases, although the systems for the prior restraint of free expression sought to be imposed varied radically, each was held to be invalid. Thus, this Court has refused to permit the use of judicial injunctions against the publication of news, in the face of a government claim of grave peril to the national security (*New York Times*); or against residential picketing and leafleting, in the face of a privacy claim (*Organization for a Better Austin*); or against rallies preaching race hatred, in the face of a claim of imminent danger of riot (*Carroll*); it has likewise struck down systems of movie censorship (*Freedman*), and a system of state-supported "informal" discouragement of the circulation of books (*Bantam Books*).

The sole case known to petitioners in which this Court has ever approved a form of prior restraint of circulation of the printed word is *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957), which is so distinguishable from the present case as to be almost totally irrelevant. The plainest distinction, of course, is that *Kingsley* involved material that was unquestionably obscene, and therefore beyond the protection of the First Amendment; no question of ob-

scenity has been raised in the present case.[6] As Mr. Justice Brennan observed, concurring in *New York Times* v. *United States, supra,* 403 U.S. at 726, n. 1:

> "... [C]ases regarding temporary restraints of allegedly obscene materials, are not in point, for these cases rest upon the proposition that 'obscenity is not protected by the freedoms of speech and press.' Roth v. United States, 354 U.S. 476 (1957)."

See also *Near* itself, which made clear that it was not intended to bring obscenity within the protection against prior restraints. 283 U.S. at 716.

Notwithstanding the clear and unequivocal nature of this unbroken chain of decisions by this Court, all were simply ignored by the courts of the State of New York. Thus, Special Term, in its opinion, without benefit of citation of a single case or other authority, astonishingly overrode all of the clear contrary precedent with the simple observation, "In its usual breadth, I do not accept the applicability of this doctrine to the present case" (4a); the Appellate Division was no more enlightening, observing only that "... we agree with Special Term that the granting of a preliminary injunction, under the circumstances here disclosed, would not constitute an invalid prior restraint upon publication" (2a); the Court of Appeals, without opinion, affirmed these incredible holdings.

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[6] At oral argument in the New York Court of Appeals, respondent's counsel in effect conceded that the book could not be attacked as obscene, but asserted that it was nonetheless not entitled to First Amendment protection because the therapeutic doctrine which it implicitly espoused, the treatment of schizophrenia without drugs and without shock, was, in respondent's counsel's view, not scientific, but "quackery." The absence of an opinion from the Court of Appeals makes it impossible to determine if this book-banning argument had any influence on the Court below.

Even if it could be argued that after a full trial of the merits in this case, and a judgment in respondent's favor, an injunction against further publication would be justifiable,[7] no such trial has been held here, and the issuance and continued existence of the injunction is still more outrageous. While it is not the province of this Court to engage in fact finding as to whether respondent may be identified in the book, or whether respondent gave permission for publication, and while it is a question of state law as to whether oral consent is sufficient, this Court has acknowledged a duty to engage in sufficient "constitutional fact finding", cf. *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, at 82 (1967); *New York Times* v. *Sullivan,* 376 U.S. 254, at 284-285 (1964), to ascertain the existence of hotly contested questions concerning factual issues—questions which, insofar as they have been resolved at all by the courts below, on the basis of affidavits and statements of counsel, have been largely resolved in favor of petitioners. See n. 2, *supra.*

To base the issuance of a preliminary injunction on such flimsy factual grounds, is still more outrageous than were the injunctions in *New York Times* v. *United States; Carroll; Freedman; Bantam Books; Kingsley;* and *Near,* all *supra,* all of which at least were based upon findings after full trial and determination of the factual issues involved. See *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* —— U.S. ——, 37 L. Ed.2d 669, at 679-680 (1973). While the scheme of regulation of advertising there involved was found to be constitutional,

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[7] Petitioners do not concede that an injunction would be proper even after a final judgment against them; precisely such an injunction was at issue, and found improper, in *Near* v. *Minnesota, supra.*

this Court carefully noted that a full trial of the issues would be necessary before any sanctions could be imposed.

> "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment. . . . [B]ecause no interim relief was granted, the order will not have gone into effect until it was *finally determined* that the actions of Pittsburgh Press were unprotected." (Emphasis supplied; fn. omitted.)[8]

In the present case, by contrast, the respondent has succeeded in having the state courts enjoin all circulation of a book under a circumstance where it is, at the most generous, doubtful in the extreme that respondent has pleaded a cause of action at all.[9] In order to reach a decision with a degree of certainty similar to that in *Kingsley* or in *Pittsburgh Press,* it would have been necessary for the courts below to decide, on this preliminary motion, the merits of the entire case; this they plainly have not done, nor could they properly have done so.

Petitioners are certainly aware of the clash of interests which lurk beneath the surface of this case, and which are still to be vigorously litigated in this case of first im-

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[8] Even with this reassurance in Mr. Justice Powell's opinion for the Court, the Chief Justice nevertheless dissented on the ground that "the weighty presumption of unconstitutionality of prior restraint" was not sufficiently respected. *Id.* at 683, n.3.

[9] Both of the opinions below implicitly recognize that there is no common law cause of action in New York for breach of doctor-patient confidential relationship, Special Term by reaching for a trade secret analogy (without citation), and the Appellate Division by vague references to an emerging constitutional right of privacy. No decisions applying New York law were even mentioned.

pression. There is, of course, a substantial privacy interest, which must be balanced against general First Amendment interests, see *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952); *Lamont* v. *Commissioner of Motor Vehicles*, 267 F. Supp. 880, 884 (S.D.N.Y. 1967), aff'd, 386 F.2d 449 (2d Cir. 1967), *cert. den.*, 391 U.S. 915 (1968); Haiman, "Speech Against Privacy," 67 N.W.U. L. Rev. 153 (1972); as well as the specific interest in not frustrating scientific publication of case histories in accordance with professional standards of disguised identity. See American Medical Association, Opinions and Reports of the Judicial Council, vii, 59 (1971); see also the thoughtful study by Ruebhausen and Brim, "Privacy and Behavioral Research," 65 Col. L. Rev. 1185, 1211 (1965), which discusses the problems involved in striving for an accommodation of "the productive tension between the needs and advancement of science and the vibrant diversity of human personality." Obviously, this certiorari petition is not the occasion for that debate, since there are unsettled questions of state law involved, as well as intermingled Federal questions. But the absolutely first and threshold question, which can only be settled by this Court's grant of certiorari, is whether a non-obscene book on a serious scientific subject can be totally banned in New York, even before these novel and perhaps difficult questions have been litigated. Petitioners respectfully urge that this Court grant certiorari, and vacate the intolerable prior restraint which has been established and perpetuated by the New York state courts.

Despite the paucity—indeed the absence—of constitutional analysis by the courts below, it must be assumed that all of the New York courts which ruled on this case must

have regarded this case as somehow not being subject to the prior restraint doctrine. If an exception can be so easily found, the integrity of this Court's rule of law is undermined. This Court should, in any event, grant certiorari to clarify whether the prior restraint prohibition will or will not allow the broad exception which has now been established in the state which contains the largest book publishing center in the country.

2. Although the injunction which has been issued against petitioners has been characterized as a "preliminary" injunction, there can be little doubt that the decision of the Court of Appeals is a "final" decision within the meaning of 28 U.S.C. §1257(3), and may be reviewed by this Court. Despite the literal language of §1257, this Court has repeatedly held that it may review nominally interlocutory decisions of state and lower federal courts, where such decisions will necessarily cause serious and continuing harm to important national policies, and where such decisions, although nominally interlocutory, in fact represent the lower court's final word on an important issue which is separable from the other issues in the case, and which might not otherwise be reachable for review by this Court. Cf. *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1, 15 L. Ed.2d 39, 42 (1965) (Opinion in chambers per Goldberg, J.).

Thus, in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the injunction against picketing which was under review was termed "temporary" by the Illinois courts. Nevertheless, the Chief Justice observed, for eight members of the Court, "the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights," and this was a major consideration influencing the

Court in the granting of certiorari. 402 U.S. 415, at 419, n. 1. Similarly, in the present case, the "preliminary" injunction has now been in effect for nearly one year, and will continue to be in effect at least until the trial of the case, if not also through the exhaustion of the state appellate process, a matter, possibly, of several more years. Likewise, in *Local No. 438, Construction & General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542 (1963), which reviewed a nominally non-final decision by the Supreme Court of Georgia, granting a temporary injunction against labor picketing, this Court's grant of certiorari was plainly influenced in large part by the need to protect and vindicate the important national policy that such disputes are solely within the jurisdiction of the National Labor Relations Board. If such importance is to be attached by this Court to a statutory policy, albeit an important one, then surely no less respect must be accorded to a fundamental national policy, embodied in the Constitution itself, and vindicated repeatedly in decisions of this Court.[10]

The finality of a lower court's decision on a particular issue, separable from the remaining issues in the case, and otherwise difficult or impossible for this Court to review, has also frequently caused this Court to review a nominally interlocutory decision. See, e.g., *Mercantile National*

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[10] Similarly in other areas where this Court, or the federal courts generally, might ordinarily refrain from exercising their discretionary jurisdiction, state action which has a chilling effect upon the exercise of First Amendment rights will nevertheless be the subject of federal judicial intervention. See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Steffel* v. *Thompson*, —— U.S. ——, 42 U.S.L.W. 4357 (March 18, 1974). If a mere "chilling effect" is to have such a result, no less will suffice in the present case, where the petitioners' First Amendment rights have in effect been frozen solid for a year.

Bank v. *Langdeau*, 371 U.S. 555 (1963); *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949); cf. *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, at 389, n. 4 (1964). Particularly relevant is *Cohen*, in which the issue was whether a plaintiff in a stockholder's derivative action could be subjected to a state requirement for the posting of a bond for costs; although the main action had not yet been decided, this Court granted review on the latter issue alone. Mr. Justice Harlan discussed at some length the reasons for this grant in his dissenting opinion in *Langdeau*, *supra*, 371 U.S. 555, at 574:

> ". . . the challenged order would not have been merged in the final judgment and . . . unless immediate review had been granted, no appellate determination of the right claimed could ever have been obtained."

In the present case, likewise, the action of the New York state courts in granting a "preliminary" injunction cannot be reviewed by this Court, unless this petition is granted. Should a final judgment for respondent be entered after trial of the case, that judgment will be the sole subject of any possible review by this Court; should petitioners prevail, of course, the issuance of the injunction, although proven all the more outrageous, will have become moot and unreviewable by this Court.

Should this Court permit the nominally interlocutory nature of injunctions such as the present one to prevent the granting of certiorari, the state courts will forever be free to grant at will injunctions *pendente lite*, without regard to their serious and lasting abridgment of First Amendment liberties. It is respectfully submitted that this Court should be governed by considerations similar to those

which are often applied in reviewing cases which are argued to be technically moot, but which, in fact, are "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, at 515 (1911); cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, at 632 (1953). Even at risk of transgressing the limits of the "case or controversy" clause, review will be granted where the rights sought to be vindicated are of sufficient importance. Surely, few rights of greater importance can be imagined than those asserted by petitioners, and this Court should grant the writ which they seek.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York,
March 26, 1974.

Respectfully submitted,

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APPENDICES

APPENDIX A

Decision Court of Appeals
February 25, 1974

Motion to amend the remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Defendants-appellants argued that the order of the Appellate Division enjoining, during the pendency of the action, all distribution of the book in issue constituted an impermissible prior restraint upon freedom of the press in violation of the First Amendment to the Constitution of the United States. The Court of Appeals considered this contention and held that the preliminary injunction did not constitute such violation.

Decision Court of Appeals
December 28, 1973

Order affirmed, with costs. Question certified answered in the affirmative. No opinion. All concur.

APPENDIX B

Decision of Appellate Division, First Department, Supreme Court, State of New York

Resettled order of Supreme Court, New York County (Silverman, J.), entered May 17, 1973, granting, to a limited extent only, plaintiff's motion for a preliminary injunction, unanimously modified, on the law and in the exercise of discretion, to the extent of enjoining, during the pendency of this action, all distribution of the book in issue, upon condition that plaintiff increases her undertaking to $5,000. Except as so modified, said order is affirmed, with $40 costs and disbursements to plaintiff.

The underlying issue in this action involves the right of a former patient to restrain her analyst's disclosure, through the means of a commercial book, of certain confidential communications. It is undisputed that the publication sought to be enjoined relates to the case history of plaintiff and her family. Plaintiff claims the near-verbatim record of her psychotherapeutic treatment constitutes a breach of confidence and an invasion of her right of privacy. Defendants contend, inter alia, that the limited injunction granted below is an invalid prior restraint (*Near* v. *Minnesota*, 283 U.S. 697). Special Term refused to apply the doctrine of prior restraint to the instant case but, because of the claimed scientific value of the disclosure, enjoined only such distributions as were not reasonably calculated to reach the scientific reader. While we agree with Special Term that the granting of a preliminary injunction, under the circumstances here disclosed, would not constitute an invalid prior restraint upon publication, we find no justification for the distinction attempted to be

drawn between "scientific readers", and the general public. Pending the outcome of this litigation plaintiff is entitled to either full protection or to no protection at all. We are of the view that, upon the record before us, she is entitled to full effective interim relief. Not every prior restraint is prohibited (*cf. Kingsley Books* v. *Brown*, 354 U.S. 436). The claimed justification for publication, resting on the alleged consent of plaintiff and the attempt to disguise her identity, does not provide a sufficient valid basis for denying the application.

Defendants also assert that no cause of action for a breach of confidentiality exists on the facts pleaded and that plaintiff cannot obtain relief under Civil Rights Law §§ 50 and 51, since those sections are inapplicable to a truthful, educative, nonfiction book on the subject of mental illness. Defendants' manner of advertising and selling the book, however, would seemingly contradict their avowed purpose of solely advancing scientific knowledge. In light of the expanding recognition of invasion of privacy actions (*cf. Griswold* v. *Connecticut*, 381 U.S. 479; *Roe* v. *Wade*, —— U.S. —— [41 U.S.L.W. 4213]; *Nader* v. *General Motors Corp.*, 25 N Y 2d 560), and in view of the confidentiality accorded the physician-patient relationship, we believe that plaintiff has alleged a cognizable claim for relief and has made a sufficient showing to warrant the granting of the provisional remedy requested.

Settle order on notice which shall provide, inter alia, for the granting of a preference for an early trial upon application of either party.

APPENDIX C

Decision of Special Term, New York County, Supreme Court, State of New York

SILVERMAN, J.:

Motion for a temporary injunction to restrain the publication and distribution of a book.

The authors are husband and wife, two psychoanalysts, the wife an M.D. and the husband a lay analyst. The book consists in very large part of a somewhat edited form of the notes of the psychoanalytic sessions (and conversations) of two patients, a husband and wife, together with a so-called diary of their child. Concededly, plaintiff and her deceased husband were the patients; they were both patients of the female defendant psychoanalyst.

In the book the patients' first names only are given, and the first names so given are not those of plaintiff, her husband or their child. Defendants claim to have made certain changes to disguise the identity of the patients without impairing the scientific validity of the book.

Defendants argue that the injunction cannot issue because of the well-established rule against prior restraints on publication. In its usual breadth, I do not accept the applicability of this doctrine to the present case. When confidential information is learned, in confidence, under a contract that it shall not be disclosed, I think an injunction will lie to restrain the unauthorized disclosure. The most obvious case that comes to mind is injunctions against disclosure of trade secrets by an employee who has learned those secrets in the course of his employment.

Here the defendants obtained information from plaintiff, under the implied, if not express, agreement that confidence would be respected, and indeed with the express

understanding that disclosure to defendant was necessary in order for defendant to perform for plaintiff the professional services for which defendant had been retained.

However, there is a countervailing consideration. It is a well-established practice in the medical profession for physicians to publish reports of interesting cases for purposes of scientific advancement or education, taking care of course not to disclose the name or identity of the patient. There is an obvious public interest in having physicians do this. And Freud published accounts of the analysis of some of his patients in this way. (e.g., *History of an Infantile Neurosis; Analysis of a Phobia in a Five Year Old Boy* [Freud, Collected Papers, Vol. 3]).

Defendants claim that the book is of scientific value; I do not think it is for judges to rule that it is not. And defendants have taken some steps to disguise the identity of the patients. I think those steps reasonably meet the usual standards for such disguising of the patients' identities. While I have not read this 1,000 page book, the examples of possible identification given by plaintiff in the moving affidavit must be assumed to be the more striking ones; I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient.

Accordingly plaintiff is not entitled to an injunction restraining all further publication and distribution of this book. In that connection I note that about 200 copies of the book have already been sold.

As the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure, defendants should not attempt to distribute the book for other purposes. Advertisements of the book in the New York Times and the New Republic referring to it as "A symphony

of feeling—read it for the sheer pleasure of an intense experience" are hardly consistent with limitation to scientific purpose of publication. In the interest of limiting the book to the scientific distribution which alone justifies its distribution—and the concomitant pain to the patient—defendants will be enjoined from distributing the book in channels not reasonably calculated to be addressed to scientific readers; i.e., defendants may distribute the book through universities, medical schools and other institutions of learning, including psychiatry, psychology, social work and related fields, and book stores associated with them; stores which carry medical, psychiatry, psychology or other scientific works; text-book stores, etc.; but not ordinary trade book channels of publication not related to the distribution of scientific works.

I pay no attention to the alleged (and disputed) implied-in-fact consent of plaintiff to publication ten years ago. A doctor who wishes to publish confidential material about his patient and relies on the patient's consent should take care to get that consent in clear, unambiguous written form.

The motion for a temporary injunction is granted to the limited extent only stated above; otherwise denied. Bond fixed at $2500.

In accordance with the stipulation of the parties, the papers in this case will be sealed, and I have signed the stipulated order to that effect.

Settle order.

This decision shall not be submitted for publication in the Law Journal.

Dated: April 24, 1973.

S. J. S.
J.S.C.

The record in this case has been sealed by order of the Court. It is not available for public inspection.

Supreme Court, U. S.
FILED
OCT 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC., Petitioners,

v.

JANE DOE, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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(4128)

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IN THE
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OCTOBER TERM, 1973

No. 73-1446

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JANE DOE, Respondent.

BRIEF FOR RESPONDENT
IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI

JURISDICTION

For the reasons set out in the Argument, the Court does not have jurisdiction to review the non-final order of the New York

Court of Appeals.

QUESTIONS PRESENTED

1. Does a doctor (psychiatrist) have the constitutional right to publish a patient's confidential communications to the doctor, despite the patient's objection to the publication, and despite a statute and regulation prohibiting the unauthorized disclosure by a physician of such information?

2. Does the Supreme Court have jurisdiction to review the order of a state court affirming an interlocutory injunction when the interlocutory order does not terminate the litigation between the parties, and there are (as Petitioners maintain) contested issues of fact and "unsettled questions of state law" still to be determined by the

trial court?

STATEMENT OF THE CASE

Petitioner Joan Roe is a psychiatrist (and is referred to hereafter as "the Psychiatrist"). The Respondent is a former patient of the Psychiatrist (and is referred to hereafter as "the Patient"). The Patient's privileged communications to the Psychiatrist were published by the Psychiatrist in a commercial book entitled "In Search of a Response" (referred to hereafter as "the book"). The book is exclusively about the Patient and her former husband, now deceased, and their son. It contains their most intimate revelations to the Psychiatrist during the seven years that the Psychiatrist treated them in psychotherapy.

The nature of the information confided to the Psychiatrist and published in the book, may be gathered from the following passage:

> "I wanted to sleep with him [her husband], he said he was very tired. I was very aroused. He tried - he got soft. Then we tried again. For a while I couldn't stand it, 'Either you sleep with me right now or I can't stand it, I won't work on it, either yes or no. Even if I don't get aroused immediately I am ready to go.' He then entered me, but he was tense and had difficulty controlling himself. I said, 'Don't worry, this is better than nothing.' ....
>
> "Henry finished but I didn't. He banged on the bed, ran to the window and looked out. I felt my vagina, it was very hot and very wet - I said, 'I am alive again.'
>
> "Henry went to sleep and I masturbated..."

Although the Patient, her husband and their child are given fictitious names

in the book, the circumstances of their lives are so unusual that the Patient and her family are identifiable.

The Psychiatrist contends, and the Patient denies, that the Patient, while under therapy, gave oral consent to the publication of the book. Both agree that the Psychiatrist requested, and the Patient refused, to give written consent. As one of the courts below indicated, if oral consent was given it would have been virtually meaningless, for there was little likelihood of informed, voluntary agreement at that time, in view of the Patient's emotional dependency upon the Psychiatrist during therapeutic treatment, and the submissive attitude induced by the treatment.

The Psychiatrist, to discourage further investigation of her publication of the

Patient's confidential communications, wrote to an attorney for the Patient suggesting that the reports that the Psychiatrist was publishing a book were merely "rumors" and that the Patient was mistaken in assuming that a book by the Psychiatrist would be about her. At the time the Psychiatrist's letter was written, the book was being printed. The Psychiatrist later admitted that the book was in fact about the Patient and her family, and only about them. The Patient did not learn of the publication of the book until it was on sale in department stores and other sales outlets, some time after the Psychiatrist's letter was received.

The Patient teaches at a university and is the mother of two children. She would suffer grievous harm if further disclosure of the secrets she confided to the Psychiatrist is allowed. The most intimate details of the

Patient's experiences with her husband, and her innermost thoughts and emotions, would be exposed to all who read the book. The statements in the book allegedly made by the Patient's husband are certain to humiliate the Patient. He is quoted in the book as having expressed the wish to murder the Patient, and he is said to have confessed homosexuality, involvement with prostitutes, and masturbation.

The Psychiatrist maintains, at pp. 2 and 3 of the Petition for Certiorari, that the book is "of great scientific and medical interest and importance". But the advertisements for the supposed scientific treatise, in newspapers and magazines of wide circulation, described the book as a "Symphony of Feeling", as a "sheer pleasure" and an "intense

experience" (A5-6).[1]

The Patient brought action in the Supreme Court of New York to enjoin further distribution and advertising of the book and to recover damages arising from the disclosure of the privileged communications. The Court of first instance enjoined distribution of the book through commercial channels during the pendency of the action (A6). The Appellate Division of the Supreme Court modified the injunction to prohibit all distribution of the book during the pendency of the action, and made provision in its order for an early trial. The Court determined that the Patient stated good causes of action under New York law for breach of the

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[1] Numbers following the letter "A" in parentheses refer to the pages of the Appendices attached to the Petition for Certiorari.

confidential relationship between a patient and her doctor, and for invasion of the right of privacy (A3).[2] In the circumstances, the Court held, a preliminary injunction was not an invalid prior restraint upon publication (A2). The Court of Appeals of New York unanimously affirmed the order of the Appellate Division without opinion.

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[2] The lower courts did not, as stated at p. 11, n. 9 of the Petition, "recognize that there is no common law cause of action in New York for breach of doctor-patient confidential relationship." See the opinion of the Appellate Division (A3).

ARGUMENT

POINT I

THE PETITION FOR CERTIORARI SHOULD BE DENIED, FOR THE STATE COURT DID NOT DECIDE A SUBSTANTIAL FEDERAL QUESTION. THE UNAUTHORIZED DISCLOSURE OF PRIVILEGED COMMUNICATIONS BETWEEN A PATIENT AND PSYCHIATRIST IS PROHIBITED BY STATE LAW. THE FIRST AMENDMENT DOES NOT PREVENT INTERFERENCE WITH THE UNLAWFUL PUBLICATION OF A PATIENT'S SECRETS.

Doctors in New York are enjoined from divulging confidential communications of their patients by two statutes. The New York Education Law, Sections 6509-6511, and the concomitant Regulations provide that violation of the duty of secrecy is professional misconduct and ground for suspension or revocation of the doctor's license. The Regulations provide: "Unprofessional conduct

in the practice of medicine shall include *** the revealing of facts, data or information obtained in a professional capacity relating to a patient or his records without first obtaining consent of the patient or his duly authorized representative, except if duly required by a court of competent jurisdiction or statute." New York Code of Rules and Regulations, vol. 8, Section 60.1.

The New York Civil Practice Law and Rules, Section 4504(a), provides:

> "Unless the patient waives the privilege, a person authorized to practice medicine *** shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

This Court repeatedly stated in the decisions cited in the Petition for Certiorari, that all restraints upon publication do not

infringe the constitutional guarantee of freedom of the press. In the leading case on the subject of prior restraint on which Petitioners rely (pp. 7, 9-10 of the Petition), Near v. Minnesota, 283 U.S. 697, 716, the Court expressly refused to restrict judicial authority "to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."

The phrase "prior restraint" is not a "self-wielding sword", — it cannot serve as a "talismanic test" of the validity of an injunction. Kingsley Books v. Brown, 354 U.S. 436, 441. In Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-419 (cited at pp. 8, 13-14 of the Petition), the Court emphasized that the injunction it held invalid did not, and was not intended to, "redress

alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." In Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 390 (in which the Court sustained a municipal ordinance forbidding publication of help-wanted advertisements classified according to sex), the Court, in discussing Near v. Minnesota, noted that it "has never held that all injunctions are impermissible."

See also United States v. Thirty-Seven Photographs, 402 U.S. 363; United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063; and Feeney v. Young, 191 App. Div. 501, 181 N.Y. Supp. 481. In Feeney v. Young, a doctor's public exhibition of a film showing his patient in childbirth was held actionable, despite the

patient's consent to the showing of the film to medical societies. Mr. Justice Harlan suggested in his separate opinion in Time, Inc. v. Hill, 385 U.S. 374, 404, that the matters disclosed to the public in Feeney v. Young were "so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication." And see Clayman v. Bernstein, 38 Pa. D & C 543, 550.

There is not, as Chief Judge Fuld observed in Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 347-348, "an unbounded freedom to publish whatever *** may have (been) said in private conversation. *** There is necessarily, and within suitably defined areas, a *** freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative

aspect."[3] There is no reference in the Petition for Certiorari to any decision of this Court, or of any other, suggesting that the injunctive order in this case abridges the freedoms guaranteed by the First Amendment. A court of equity, to protect private rights such as those asserted by the Patient in this case, clearly has power to restrain unauthorized disclosure of privileged information in advance of trial.

POINT II

THE ORDER OF THE NEW YORK COURT OF APPEALS IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. SECTION 1257.

The Petitioners maintain that

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[3] Emphasis in original, matter in parentheses added.

jurisdiction to review the order of the state court is conferred upon this Court by the statute 28 U.S.C. Section 1257(3) (Petition for Certiorari at pp. 2, 13-16). That section provides that "final judgments or decrees rendered by the highest court of a State *** may be reviewed by the Supreme Court ***." There can be little question that the order of the New York Court of Appeals that Petitioners seek to review, is not a final, but an interlocutory, decree.

As used in the statutes defining appellate jurisdiction: "*** a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." St. Louis I.M. & S. Ry. Co. v.

Southern Express Co., 108 U.S. 24, 28. In Cobbledick v. United States, 309 U.S. 323, Mr. Justice Frankfurter wrote for the Court at p. 326:

> "In thus denying to the appellate courts the power to review rulings at nisi prius, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality — the idea underlying 'final judgments and decrees' *** is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system ***"

There are a few instances in which the Court agreed to review the determination of a state court that was interlocutory in form, but decisive of the cause. In Organization for a Better Austin v. Keefe, 402 U.S. 415, for example, the Court vacated a temporary injunction forbidding petitioners from distributing "literature of any kind"

[402 U.S., note at p.418, and p.419]. However the petitioners in Keefe apparently did not have any legal or factual defenses to the action against them for a permanent injunction, other than the First Amendment arguments they presented to this Court.[4] Further proceedings against them in the Illinois court were likely to be "little more than a formality". Even in that case the Court expressed doubt with respect to its jurisdiction [402 U.S., note at p.418].

The Petitioners in this action, which includes a cause for money damages that has not yet been passed upon, do not maintain that this Court's decision would, at this stage of the case, determine the issues between the parties. Petitioners insist that there are

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[4] See Mr. Justice Harlan's dissenting opinion in Keefe, 402 U.S. at p.421.

"unsettled questions of state law" and "hotly contested" issues of fact still to be resolved by the New York courts (Petition at pp. 10-12). Even if the Court were to accept jurisdiction and vacate the interlocutory order, a trial of the issues between the parties would be required. Petitioners have been granted an early trial (A3) and state that they intend to "vigorously litigate" the issues in the case in the trial court and in the New York appellate courts in the event of a decision adverse to them (Petition at pp. 5, 11). It is apparent that this case is not, in any sense, a "final judgment or decree", terminating the litigation between the parties on the merits.

CONCLUSION

FOR THE REASONS OUTLINED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This brief is respectfully submitted in reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari. Although Respondent's brief presents little relevant law, the facts as presented by Respondent are so seriously misstated[1] as to distort the entire nature and present posture of the case. Throughout Respondent's statement of the case, there are numerous erroneous assertions of fact, which are not supported by record references of any sort.

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[1] Respondent takes up most of page 4 of its brief with a quotation from the book which it attempts to portray as typical of the "information confided." The extent of this gross deception is clear when the quotation is placed in the context of the book's 1008 pages (and 1716 footnotes), which make it apparent that it is in fact a scientific case history of the treatment of schizophrenia.

1. The central and critical misstatement[2] is the assertion, at pages 4-5 of Respondent's brief, that "Although the Patient, her husband and their child are given fictitious names in the book, the circumstances of their lives are so unusual that the Patient and her family are identifiable."[3]

If the Respondent cannot be identified by readers of the book, her entire case falls, as she simply is not hurt in any way by a book which reveals that some anonymous person told her psychotherapist of the experiences related in the book. On this crucial issue, only one court has made a clear finding, and that finding was directly contrary to Respondent's assertions, the *nisi prius* court having held it most unlikely that the Respondent could be identified by readers of the book (5a). Even if this factual issue had not been resolved in any way, much less where it has been resolved against the Respondent, the central issue presented by this petition is whether federal constitutional law

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[2] Numerous other serious distortions appear. Among these are the assertion (p. 5) that "Both [parties] agree that the psychiatrist requested, and the Patient refused, to give written consent," to publication. Petitioners deny that this is so. Petitioners also do not agree with Respondent's characterization of the correspondence between Dr. Doe and the Respondent's prior attorney (pp. 5-6). Dr. Doe was not attempting "to discourage further investigation," nor attempting to suggest that the book was not about the Respondent. Indeed, the letter in question, which was in *response* to the attorney's letter, stated that the complete manuscript was in Respondent's possession for more than 10 years, a fact which the brief in opposition does not reveal. Dr. Doe, in fact, invited further communication, and when none was forthcoming, assumed that the earlier consent to publication remained valid.

[3] In addition to the change of names, numerous other steps were taken to disguise the Patient's identity; the book describes the patient as the mother of an only child, while, as even Respondent's brief notes (p. 6), the Patient has two children. The locale of the events in the patient's life is not identified. Most significantly, the therapy which is the subject of the book began *more than 17 years ago*, in 1956, and terminated more than 10 years ago, in 1963.

permits the issuance of a preliminary injunction, where issues of fact and of state law concerning the substance of the case are almost totally unresolved. The courts below have reached a final and clearly erroneous decision on this major constitutional issue, and that error may only be resolved if this Court grants certiorari.

2. The error committed by the courts below flows from a total misperception of the presumption in favor of freedom of the press which is guaranteed by the First Amendment. In essence, the lower courts have held that because there is a *possibility* that further publication of the book will invade the Respondent's privacy, and there is a *possibility* that New York law will finally be found to give a cause of action for such invasion, there must issue an injunction which immediately and unavoidably abridges the constitutional liberties of the Petitioners and of countless members of the reading public, lay and professional alike.[4]

For similar reasons, none of the arguments presented in Point I of Respondent's brief are of any particular relevance. The provisions of New York statute and regulations —which allow professional discipline as the sole remedy— concerning the disclosure by doctors of communications from their patients plainly contemplate situations in which the patient's identity is revealed, as do such cases as *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y. Supp. 481 (Sup. Ct. 1st Dept. 1920) (patient's photograph revealed in motion picture, without written consent, in violation of Sections 50 and 51 of New York Civil Rights Law).

---

[4] Respondent's brief is totally silent on the chilling effect on medical case history publication of a doctrine which requires written consent regardless of the effectiveness of the disguise. Rather than face this question, Respondent quotes a "salacious" passage and inaccurately implies that it is typical. See n. 1, *supra*.

3. Respondent's assertions that this Court is without jurisdiction, because the decision below is not sufficiently final, are plainly without merit. The courts below have reached a final decision, otherwise unreviewable by this Court, on an important issue of federal constitutional law: whether the First Amendment permits the granting of a preliminary injunction against publication of a book upon a factual and legal showing as flimsy as that presented by Respondent here. Indeed, the very case cited by Respondent, *Cobbledick* v. *United States*, 309 U.S. 323 (1940), makes plain that the application of the finality doctrine is a matter of policy, to further the orderly administration of justice and to avoid interrupting a case to "consider incidentally a question which has happened to cross the path of such litigation. . . ." 309 U.S. at 326, quoting *Segurola* v. *United States*, 275 U.S. 106, at 112 (1927) (per Mr. Chief Justice Taft).

So far from being an incidental question which has happened to cross the path of this case, the issue presented by this petition is one which is central and critical to the entire case, and which has arisen because of the Respondent's own actions in seeking a preliminary injunction. As *Cobbledick* makes clear, review will not be denied where to do so would render the Petitioner "powerless to avert the mischief of the order" which is sought to be reviewed, and where such denial would make the finality doctrine "a means of denying [Petitioner] any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." 309 U.S. at 328-329.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
May 9, 1974.

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In the

Supreme Court of the United States

October Term, 1973

No. 73-1446

Joan Roe, Peter Poe, and Coe Press, Inc.,

Petitioners,

—v.—

Jane Doe,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

Opinions Below

The Court of Appeals of the State of New York decided this case without opinion; its original decision is reported at 33 N.Y.2d 902, —— N.E.2d ——, 352 N.Y.S.2d 626, and is set forth in the Appendix at A127; its amended decision, showing the presentation of a federal question, is reported at 34 N.Y.2d 562, —— N.E.2d ——, 354 N.Y.S.2d 941, and is set forth at A128. The opinion of the Supreme Court, Appellate Division, First Department, reported at 42 A.D. 2d 559, 352 N.Y.S.2d 626, is set forth at A103-105, and that of Supreme Court, Special Term, New York County (unreported) at A82-85.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The decision of the Court of Appeals of the State of New York, of which review is here sought,

was entered on December 28, 1973, and the Petition for a Writ of Certiorari was filed within ninety days, on March 27, 1974; this Court granted the writ on May 28, 1974.

Constitutional Provision Involved

United States Constitution, Amendment One:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Questions Presented

1(A). Whether the courts below erred in holding that it was not an invalid prior restraint upon freedom of the press, in violation of the First Amendment, to grant a preliminary injunction, completely prohibiting the distribution and sale of a concededly truthful, nonobscene book concerning matters of scientific and medical interest and importance, particularly where the factual grounds alleged in support of the injunction remain disputed and unresolved.

(B) Whether such a prior restraint is constitutionally permissible in the case of a former patient seeking to enjoin publication of an over-10-year-old disguised case history, where the patient claims she is identifiable, notwithstanding the finding by the Court which issued the injunction that the identity of the patient had been disguised in accordance with the usual professional standards in case history publication.

2(A). Whether a state, if it grants to a patient a cause of action for alleged breach by a doctor of the confidential doctor-patient relationship, must limit such a cause of action in compliance with Constitutional standards.

(B). Whether the New York courts, in granting the injunction herein, have established a cause of action which does not, in fact, comply with Constitutional requirements.

Statement of the Case

The petitioners in this case are bringing to this Court for review the extraordinary—indeed, absolutely unprecedented—action of the courts of the State of New York, which for over a year have enjoined the distribution and sale of a concededly truthful and non-obscene book, concerning matters of great scientific and medical importance. The courts below, it is respectfully submitted, have grievously abridged the liberties not only of the petitioners, who are the authors and publisher of the book, but also of countless members of the reading public, lay and professional alike, who are being denied their right to choose for themselves what they wish to read.

The facts in this case, insofar as facts have been found at all by the courts below, are set out most fully in the opinion of the New York Supreme Court, Special Term (A82-85). The petitioners Dr. Roe and Mr. Poe (a wife and husband who are, respectively, a psychiatrist and a lay psychotherapist), wrote the book which is here in issue, and it was published by the third petitioner, Coe Press, Inc. The book, published in February, 1973, consists largely of disguised case histories of the psychiatric treatment of the respondent, Jane Doe, who was from 1956 to 1963 a psychotherapeutic patient of the petitioner Roe, and of the treatment of the respondent's late former husband,[1] who

[1] Mr. Doe was divorced from the respondent in 1963 and remarried shortly thereafter; his new wife, with whom he lived until his death in 1971, resides in New York City, and is well aware of this

during portions of the same period was also a patient of Dr. Roe; the book also contains a brief section concerning one of the children of the respondent. The treatment began more than seventeen years ago, and ended over ten years ago. All of the events related in the book, consequently, are dated by more than a decade.

The respondent learned of the book's publication at about the time it occurred in February, 1973; a month later, she instituted this action in Supreme Court, New York County, alleging that despite the steps taken by the authors to disguise her identity,[2] she could be recognized by the readers of the book, and that the facts of her life thereby revealed were of an intimate and embarrassing nature. She sought both damages, and an injunction against further publication. By order to show cause, she also sought a preliminary injunction, during the pendency of the action, against further publication.

On the return of the order, in Supreme Court, New York County, Special Term, Part I, the *nisi prius* court was presented with affidavits by the parties and others, which reveal chiefly that there are numerous, seriously disputed questions of fact, most importantly, as to whether the respondent's identity can be determined by a reader of the book, and as to whether the respondent gave permission for publication of the book (A8-24, 27-76). Insofar as

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litigation; significantly, despite respondent's assertions that she can be identified in the book largely through the facts of her former husband's life, his widow has taken no steps to assist respondent in this action.

[2] *Inter alia*, fictitious names were used for the patients, the locale of the book was not mentioned, and plaintiff was portrayed as the mother of an only child, although she in fact is the mother of two sibling children.

Special Term resolved these factual disputes at all—and it is the only one of the courts below which has made any significant comment on its view of the facts—it resolved them largely in the petitioner's favor.[3]

Nevertheless, after the briefest of consideration, proceeding solely upon the affidavits and upon oral argument by counsel, without any evidentiary hearing, Special Term issued a partial injunction against further circulation of the book, limiting its distribution solely to "scientific" and "medical" channels, and barring it from "trade book channels of distribution" to the general public (A95). This the court did although it did not offer citation to a single precedent, from this Court or any other, in justification of its literally unprecedented action.

Petitioners forthwith appealed to the Appellate Division, First Department; that intermediate appellate court, on the basis of an even obscurer opinion (A103-105) characterized by vague references to "the expanding recognition of invasion of privacy actions," not only affirmed the issuance of the injunction, but broadened it so as to prohibit *any* distribution of the book whatsoever, whether through

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[3] Special Term found:

> ". . . [D]efendants have taken some steps to disguise the identity of the patients. I think these steps reasonably meet the usual standards for such disguising of patients' identities" (A83) and " . . . the examples of possible identification given by plaintiff in the moving affidavit [A12-17] must be assumed to be the more striking ones. I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient" (A83-84).

The double negative of the last sentence is particularly significant. Special Term finds that plaintiff would *not* be identifiable to any persons who did *not* know that she was a patient of respondent Roe, but does not affirmatively find that she would be identifiable to anyone.

medical-scientific channels or otherwise. Petitioners again appealed by permission of the Appellate Division, to the Court of Appeals of the State of New York. Inexplicably, the Court of Appeals affirmed, without opinion, and without discussion of the merits in any way whatsoever (A127).

Although petitioners have sought at every stage to expedite the proceedings in the State courts, in the hope that the requirements of the First Amendment would be recognized and the injunction would be lifted,[4] distribution of the book has now been enjoined for well over one year, since the entry of the order of Special Term on May 7, 1973. If this Court does not vacate the actions of the courts below, the injunction will remain in effect throughout the pendency of the trial and appeals of this action, which could well consume a period of years. This Court should not countenance such an egregious abridgement of the precious rights which are guaranteed by the First Amendment.

Summary of Argument

I.

A. The opinions of the courts below have conceded that the preliminary injunction is a prior restraint on publication but they have sought to justify it by a flimsily articulated standard which is grossly inconsistent with rulings of this Court. By holding that petitioners must bear the burden of justifying their publication, the lower courts have failed to recognize that a prior restraint is

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[4] The appeal to the Appellate Division was heard on an expedited basis at a special June, 1973, term of that court, rather than being held over through the summer recess. On the appeal to the Court of Appeals, a preference was granted upon motion of the petitioners.

presumptively unconstitutional, and that the burden—an enormous one—must be borne by those who seek injunctive relief.

That a prior restraint is condemned as presumptively unconstitutional is established by an unbroken tradition of decisions of this Court commencing with *Near* v. *Minnesota,* 283 U.S. 697 (1931), and is a doctrine accepted by every member of this Court. Nor may the doctrine of prior restraint be circumvented by enjoining a publication after it is published. As cases and authoritative text make clear, the essence of a prior restraint is that it acts against the published work, and bars it from availability to the public, as distinguished from subsequent punishment which is directed, when appropriate, at the author or the publisher.

The only exceptions allowed or postulated by this Court are confined to obscenity, which is not protected by the First Amendment, and grave threats to national security. Neither such exception is even arguably a factor in this case.

B. Although this Court has never precisely charted the showing which must be made to overcome the enormous presumptive unconstitutionality of prior restraints, it is plain that respondent has egregiously failed to meet that burden, both on the facts and the law.

On the central factual question of whether respondent's identity has been adequately disguised, the only finding in the record is that made by the *nisi prius* court that petitioners have "reasonably" met "the usual standards for such disguising of patients' identity," and nowhere in the record is there a judicial finding that respondent could be

identified by anyone. Moreover, there was no evidentiary hearing at all, much less the kind of prompt and final determination on the merits which this Court has declared constitutionally necessary in those extraordinary situations where it has allowed a publication to be enjoined.

The prior restraint is likewise impermissible because of the highly dubious and speculative nature of any legal basis respondent may have for her claim. The "trade secret" analogy hinted at by the Justice at Special Term, and the vague references to "privacy" in the opinion of the Appellate Division, do not set forth any substantial basis for a cause of action in New York, old or new, and are, in any event, constitutionally insufficient for the extraordinary remedy of enjoining a publication.

II.

Inasmuch as the New York courts nevertheless appear to have created a new cause of action, and have ordered a prior restraint based thereon, this Court, in vacating the injunction, should clarify that any such cause of action must comply with First Amendment requirements.

The medical case history is an established and important institution for the advancement and dissemination of medical knowledge. A cause of action which allows a patient or former patient to obtain damages—and injunctive relief—for the publication of a case history, regardless of the sufficiency of the disguise, unless there is prior written consent, would have a stifling effect on medical and scientific publication, and would abridge First Amendment rights.

Petitioners urge that the only standard which would be consistent with the First Amendment would be one which subjects case history publication to the normal professional

standards of disguised identity, and which restricts liability to a willful or reckless disregard of such standards. Cf. *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967). In any event, the Courts below appear to have embraced a standard of absolute liability, which should be repudiated by this Court as being constitutionally incompatible with both freedom of the press and the advancement of medical knowledge.

ARGUMENT

POINT I

The issuance and affirmance of the injunction by the courts below is in direct contravention of the First Amendment to the United States Constitution as repeatedly interpreted by this Court.

A. *The Injunction Constitutes a Prior Restraint, and Is Therefore Presumptively Unconstitutional.*

That the preliminary injunction granted by Special Term, broadened by the Appellate Division, and affirmed by the Court of Appeals, is a prior restraint on publication is beyond doubt, and conceded by the courts below (A83, 104). That such prior restraint, in the circumstances of this case, is forbidden under the First Amendment to the United States Constitution is equally beyond doubt. Although both parties presented extensive arguments on this point in the courts below, Special Term, in its opinion, without benefit of citation to a single case or other authority, astonishingly overrode all of the clear contrary precedent with the simple observation, "In its usual breadth, I do not accept the applicability of this doctrine to the present case" (A83). The Appellate Division was no more enlightening, observing

only that "we agree with Special Term that the granting of a preliminary injunction, under the circumstances here disclosed, would not constitute an invalid prior restraint upon publication. . . . Not every prior restraint is prohibited" (A104). Only a citation to an irrelevant obscenity case, *Kingsley Books* v. *Brown*, 354 U.S. 436 (1957), discussed *infra*, is offered in support of that holding. The affirmance without opinion of the Court of Appeals, of course, offers no clue whatever to that Court's reasoning. Any more careful analysis of the law of prior restraint, however, cannot but make plain that the issuance of the injunction was erroneous.

The central error in the decisions of the courts below, it is respectfully submitted, is expressed in Special Term's assumption that ". . . the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure . . ." (A84). This approach to the question of freedom to publish, of course, is precisely the opposite to the correct approach. " . . . [P]rior restraint of the right of expression . . . calls for a higher hurdle. . . ." *Roaden* v. *Kentucky*, 413 U.S. 496, at 504 (1973). The entire thrust of the First Amendment is that there is a presumption in *favor* of freedom to publish, and it is not for the courts to place the burden of justification on the publisher. See *Healy* v. *James*, 408 U.S. 169, at 184-185 (1972).

The decisions below stand in direct contravention of over four decades of clear and unequivocal decisions by this Court, that prior restraints upon freedom of the press are presumptively unconstitutional, and that the precious and highly preferred rights which are protected by the First Amendment can be overcome only by carry-

ing the heaviest burden of justification. As the Chief Justice has recently observed, ". . . every member of the Court, tacitly, or explicitly, [has] accepted the Near and Keefe condemnation of prior restraint as presumptively unconstitutional." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, at 396 (1973) (Dissenting Opinion). This solid tradition is founded on the very core of the First Amendment. Professor Emerson, one of the nation's most respected authorities on the First Amendment, has written:

> "As a starting point, one must assume the general principle that under the First Amendment and our notions of a democratic society, freedom of expression is the rule and constraint the exception. It is not necessary to assume that the First Amendment imposes an absolute prohibition against governmental restriction upon public expression nor to accept the constitutional interpretation that gives the First Amendment a 'preferred position' in the scale of constitutional values. . . . But the more commonly accepted principle, that only in the most urgent circumstances can a limitation upon freedom of expression be justified, and that the courts, under the First Amendment, have a serious obligation to strike down limitations which do not clearly meet such conditions, is fundamental to any analysis of prior restraint." T. Emerson, "The Doctrine of Prior Restraint," 20 LAW & CONTEMP. PROB. 648, 655 (1955).

Any analysis of prior restraint must begin—and indeed, can nearly end—with this Court's decision in the Minnesota "gag law" case, *Near* v. *Minnesota,* 283 U.S. 697 (1931), which remains the leading precedent on prior restraint.

In *Near*, the petitioner was the publisher of a "scandal sheet" known as *The Saturday Press*, in which he printed highly scurrilous and defamatory allegations concerning corrupt connections between gangsters and various officials of Minneapolis, and the involvement in such connections of members of Minneapolis' Jewish community. After nine issues had been distributed, the state authorities obtained an injunction forbidding the defendants to publish, circulate, or have in their possession any editions of *The Saturday Press* already published, or any future editions of it or of any similar publication.

This Court made clear, in no uncertain terms, that the injunction which had been granted was an impermissible prior restraint. Mr. Chief Justice Hughes wrote, for the Court:

> "The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in the renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases

before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.' 4 Bl. Com. 151, 152; see Story on the Constitution, §§1884, 1889." 283 U.S. at 713-714 (emphasis in original; footnote omitted).

"In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication." 283 U.S. at 715.

"For these reasons we hold the statute, so far as it authorized the proceedings in this action . . . to be an infringement of the liberty of the press guaranteed by the 14th Amendment . . . [T]he statute imposes an unconstitutional restraint upon publication." 283 U.S. at 722-723.

Nor was any distinction recognized by the Court between the enjoining of future issues of the publication, and the enjoining of further circulation of those issues which had already been published. The entire injunction was found to be improper. See Z. Chafee, FREE SPEECH IN THE UNITED STATES, 375-381 (Atheneum Edition, 1969).

It was not any mere oversight which led the Court to hold that enjoining the further circulation of already published issues was a prior restraint. The dissenting opinion of Mr. Justice Butler makes clear that this issue was before the Court:

> "The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. . . . It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles, and the *previous restraint* upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes." 283 U.S. at 735-736 (emphasis in original).

Thus it is plain that the *Near* court intended to hold, and did hold, that the enjoining of further circulation, after a newspaper, or a periodical, or a book has once been published, is no less a prior restraint than is an order forbidding publication at all.

Respondent argued in the courts below, and will no doubt argue in this Court, that once so much as a single copy of a book has reached the public, an injunction against further circulation does not constitute a prior restraint or any violation of the First Amendment. The error in this argument is that it focuses on only a single form of prior restraint, when it is plain that there are many forms. It is similarly plain that all are condemned equally by the First Amendment. Professor Emerson, in "The Doctrine of Prior Restraint," *supra,* at 655-656, identifies four broad categories of such restraints: first, licensing schemes prohibiting *any* publication without prior approval of an administrative official or censor; second, the invocation of the judicial process to obtain injunctive relief, as in *Near,* and as plaintiff is attempting in this case; third, legislative restraints permitting publication only upon the satisfaction

of certain prior conditions, such as the payment of taxes or the registration of lobbyists; and fourth, most indirectly, those "secondary" restraints resulting from such legislative schemes as the requirement to hold certain political views as the test of holding an office.

An argument asserting that an injunction such as the one obtained here does not constitute a prior restraint, fails to recognize these several categories of prior restraints, but deals solely with the first and most elementary of them. The error is in failure to perceive that a prior restraint is characterized not by the *time* it is invoked—not by whether or not it occurs "prior" to the first circulation of the material in question—but by the method of the restraint, and at whom or what it is directed. Thus, the common thread in all of the forms of prior restraint delineated by Prof. Emerson, *supra*, is that each in one way or another involves an order by some organ of the government that the circulation of the subject material be forbidden. The essence of a prior restraint is that the law acts against the publication, not the publisher.[5]

This principle was most recently reaffirmed by this Court in *Heller* v. *New York*, 413 U.S. 483 (1973), an obscenity case in which the Chief Justice's opinion for the Court made abundantly clear that, while a single copy of an allegedly obscene film, book, or other article might properly be seized in order to preserve evidence to determine its

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[5] For an excellent historical analysis of the evolution of the law of prior restraint, see *Alderman* v. *Philadelphia Housing Authority*, —— F.2d ——, ——, 42 U.S.L.W. 2574 (3rd Cir. Civ. No. 73-766, April 16, 1974). Judge Adams, in the course of his analysis, quotes Milton's Areopagitica: "Who kills a man kills a reasonable creature, God's image; but he who destroys a good book kills reason itself . . ." *Alderman*, *supra*, —— F.2d at ——, —— U.S. L.W. at ——.

obscenity, the state must be absolutely scrupulous in permitting continued exhibition or circulation pending a final judicial determination. The risk of imposing a prior restraint on protected material is otherwise too great. 413 U.S. at 492. Any fanciful notion that the law of prior restraint becomes inoperative after initial publication is totally demolished by *Heller*.

Following *Near*, this Court, notwithstanding its changing composition, has been absolutely consistent, to the present day, in holding that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Heller* v. *New York*, *supra*, at 491; *Healy* v. *James*, 408 U.S. 169, at 184 (1972); *New York Times Co.* v. *United States*, 403 U.S. 713, at 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, at 181 (1968); *Freedman* v. *Maryland*, 380 U.S. 51, at 57 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, at 70 (1963). In every one of the latter cases, although the systems for the prior restraint of free expression sought to be imposed varied radically, each was held to be invalid. Thus, this Court has refused to permit the use of judicial injunctions against the publishing of news, in the face of a government claim of an extreme threat to national security (*Times*); or against residential picketing and leafletting, in the face of a privacy claim (*Keefe*); or against rallies preaching race hatred, in the face of a claim of imminent danger of riot (*Carroll*); it has ruled that a college may not deny recognition to a student organization without first meeting the burden of demonstrating the appropriateness of denial of recognition (*Healy*); it likewise struck down a system of movie censorship (*Freedman*), and a system of state-supported, "in-

formal" discouragement of the circulation of books (*Bantam Books*). See also *Alderman* v. *Philadelphia Housing Authority*, —— F.2d ——, 42 U.S.L.W. 2574 (3d Cir. Civ. No. 73-766, Apr. 16, 1974) (absolute ban on comment by housing authority employees on pending tenant plebiscite); *Albany Welfare Rights Organization* v. *Wyman*, 493 F.2d 1319 (2d Cir. 1974) (prohibition of distribution of welfare rights information in public waiting room of welfare center).

The sole case known to petitioner in which this Court has ever approved a form of prior restraint of circulation of the printed word is *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957), which is so clearly distinguishable from the present case as to be almost totally irrelevant.[6] The plainest distinction, of course, is that *Kingsley* involved material which was unquestionably obscene, and therefore beyond the protection of the First Amendment. No question of obscenity has been raised in the present case.[7] As Mr. Justice Brennan observed, concurring in *New York Times* v. *United States*, *supra*, 403 U.S. at 726, fn. 1:

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[6] As the *Kingsley* Court observed, "The phrase prior restraint is not a self-wielding sword. Nor can it serve as a talismanic test." *Id.* at 441. This Court has indeed before and since occasionally approved prior restraints under certain very limited, carefully defined circumstances. While the Court has never fully defined all of the elements constituting the "heavy burden" which a would-be censor, private or public, must satisfy, plaintiff has satisfied *none* of the tests which have been advanced in the cases; see Point IB, *infra*.

[7] At oral argument in the New York Court of Appeals, respondent's counsel in effect conceded that the book could not be attacked as obscene, but asserted that it was nevertheless entitled to no First Amendment protection, because the therapeutic view it expressed, the treatment of schizophrenia without shock or drugs, was not scientific, but "quackery."

> ". . . [C]ases regarding temporary restraints of allegedly obscene materials, are not in point, for those cases rest upon the proposition that 'obscenity is not protected by the freedoms of speech and press.' *Roth* v. *United States*, 354 U.S. 476 (1957)."

See also *Near* itself, which made clear that it was not intended to bring obscenity within the protection against prior restraints. 238 U.S. at 716.[8]

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[8] *Near* also suggested that a prior restraint might be valid in such "exceptional cases" as "the publication of the sailing dates of transports or the number and location of troops," 283 U.S. at 716, citing Mr. Justice Holmes' well-known dictum in *Schenck* v. *United States*, 249 U.S. 47, at 52 (1919) concerning the scope of emergency powers "When a nation is at war . . . ." But even a governmental claim of threat to national security was deemed insufficient to overcome the presumption in *New York Times Co.* v. *United States*, *supra*. Compare *United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir. 1972), cert. den. 409 U.S. 1063 (1972).

It has been intimated by respondent in the Brief in Opposition to Certiorari, p. 12, that *Near* also authorized, at 283 U.S. 716, an exception "to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity." Petitioners respectfully submit that this is a distorted and extracontextual reading of *Near*. Chief Justice Hughes in fact wrote, after noting possible exceptions for war-time emergency powers and obscenity cases: "These limitations are not applicable here. *Nor are we now concerned with questions as to the extent of authority* to prevent a publication in order to protect private rights according to principles governing the exercise of the jurisdiction of courts of equity." 283 U.S. at 716. (Emphasis added to indicate words omitted by respondent.) That this additional sentence was not intended to create another exception was made even clearer by Mr. Justice Harlan in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, at 149 (1967). At the conclusion of the sentence quoted from *Near*, Chief Justice Hughes appended footnote 7, which reads "See 29 Harvard L. Rev. 640." The article cited is Prof. Roscoe Pound's well-known but never-accepted argument urging "Equitable Relief against Defamation and Injuries to Personality." And Mr. Justice Harlan pointed out in *Curtis* that ". . . we have rejected all manner of prior restraint on publication, Near v. Minnesota [citation], despite strong arguments that if the material was unprotected the time of suppression

Notwithstanding the clear and unequivocal nature of this unbroken chain of decisions by this Court, all were simply ignored by the courts of the State of New York.[9] Special Term's opinion, without benefit of citation to a single case or other authority, simply ignored all of the clear contrary precedent with its astonishing observation, "In its usual breadth, I do not accept the applicability of this doctrine [of prior restraint] to the present case" (A83); the Appellate Division was no more enlightening, observing only that ". . . we agree with Special Term that the granting of a preliminary injunction, under the circumstances here disclosed, would not constitute an invalid prior restraint upon publication." (A104); the Court of Appeals, without opinion, affirmed these incredible holdings.

It is plain, however, as has been demonstrated, that under this Court's decisions, the injunction which is now outstanding ". . . is nothing if not a form of prior restraint . . .," *Doe* v. *McMillan*, 403 U.S. 306, at 345 (1973) (Opinion of Rehnquist, J., concurring in part and dissenting in part), in its clearest form. It is equally plain, as will now be

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was immaterial," specifically citing the Pound article, *Curtis, supra*, 388 U.S. at 149. Thus the most that can be said is that Chief Justice Hughes in 1931 was aware of Prof. Pound's advocacy of prior restraint, and never accepted it, and Mr. Justice Harlan writing 36 years later, authoritatively stated that the argument had been rejected.

[9] Appellate courts in other states have not demonstrated comparable difficulties in recognizing and striking down prior restraints. See, e.g., *American Broadcasting Companies, Inc., et al.* v. *Smith Cabinet Manufacturing Company, Inc.*, —— Ind. App. ——, ——N.E.2d ——, 43 U.S.L.W. 2009 (Ind. Ct. of Apls., 1st Dist., No. 1-1273A219, June 12, 1974) (dissolving preliminary injunction against television broadcast of documentary film segment which lower court judge found to be false depiction of flammability of baby crib).

shown, that respondent has failed utterly to satisfy the heavy burden which must be met before any such injunction may issue.

B. *Plaintiff Has Failed to Make the Showing Required to Overcome the Constitutional Presumption Against Prior Restraints.*

Despite the clear and weighty presumption, to which this Court has adhered for nearly half a century, against the allowance of prior restraints, respondent has succeeded in having the courts below enjoin for over a year the book which is here in issue, and has done so on such a flimsy factual and legal basis as to be utterly outrageous. Even if it could be argued that after a full trial of the merits of this case, and a final judgment in respondent's favor, an injunction against further publication would be justifiable,[10] no such trial has been held here, and the issuance and continued existence of the preliminary injunction is an all the more egregious violation of the First Amendment. It is of course not the province of this Court to engage in fact finding as to whether respondent may be identified in the book, or whether she gave permission for publication; and it is a question of state law as to whether written consent to case history publication is necessary, or whether respondent should have a cause of action at all.[11] This Court has nevertheless acknowledged a duty to engage in sufficient "constitutional fact finding," cf. *Beckley Newspaper Corp.* v. *Hanks,* 389 U.S. 81, at 82

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[10] Petitioners do not concede that an injunction would be proper even after final judgment against them; precisely such an injunction was at issue, and found improper, in *Near.*

[11] But any such cause of action must, of course, meet constitutional requirements; see Point II, *infra.*

(1967); *New York Times* v. *Sullivan*, 376 U.S. 254, at 284-285 (1964), to ascertain whether the constitutional standards which must control in this case have been properly applied by the courts below.

What is revealed by the record, however, is that there are hotly contested factual questions concerning the most central issues in this case, of identification of the plaintiff, and of her permission to publish; insofar as these factual issues have been resolved at all, they have been largely resolved in favor of the petitioners. See n. 2, *supra;* it is doubtful that plaintiff can be recognized at all by readers of the book, and if she cannot be identified, the book's publication simply does not harm her, and she has *no* legally cognizable interest for the state to protect.

Likewise, there are seriously disputed and unresolved issues of state law in the case, primarily whether the New York courts will, after more than 70 years, overrule the venerable[12] precedent of *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), and recognize for the first time some sort of "right of privacy" beyond the statutory right contained in §§50-51 of the New York Civil Rights Law. The highest court to have spoken on this issue in this case could offer no more than a passing reference to "the expanding recognition of invasion of privacy actions" (A104).[13] It did not even begin to define,

[12] But still vital; see *Nader* v. *General Motors Corp.*, 25 N.Y.2d 560, at 573, 255 N.E.2d 765, at 776, 307 N.Y.S.2d 647, at 658 (1970) (concurring opinion of Judge, now Chief Judge Breitel).

[13] Both of the opinions in the courts below implicitly recognize that there is no common law cause of action in New York for breach of doctor-patient confidentiality, Special Term by reaching for a strained trade secret analogy (see p. 26, *infra*) and the Appellate Division by limiting itself to the above vague observation. No decisions applying New York law were even mentioned.

much less analyze, the nature or extent of the interests supposedly sought to be protected by the state, and to outweigh the clear and essential interests protected by the First Amendment.[14]

The issuance of a preliminary injunction, based on such flimsy factual grounds, and undefined legal grounds, is an example of the very evil against which this Court warned in *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations, supra.* While the scheme of regulation of illegal discriminatory advertising there involved was found to be constitutional, the Court carefully noted that a full trial of the issues would be necessary before any sanctions could be imposed:

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[14] Any such analysis would have to confront the holdings of this Court that even in the case of a clash between a privacy claim and a First Amendment claim, the primal magnitude of the First Amendment must prevail; see *Organization for a Better Austin, supra*, 402 U.S. 415, at 419-420; *Time Inc.* v. *Hill*, 385 U.S. 374, at 388 (1967); particularly is this so where the First Amendment infringement is a prior restraint, see *Organization for a Better Austin.* See also *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952); *Albany Welfare Rights Organization* v. *Wyman*, 493 F.2d 1319, at 1324 (2d Cir. 1974) ("We do not consider the right of privacy of the welfare recipients as a compelling consideration against First Amendment rights.") As Judge Frankel has held: ". . . plaintiff proposes to stretch the constitutional dimensions of 'privacy' far beyond any reasonably foreseeable limits the courts ought to enforce." *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, 884 (S.D.N.Y. 1967), aff'd 386 F.2d 449 (2d Cir. 1967), cert. den. 391 U.S. 915 (1968). Prof. Franklyn S. Haiman, who has closely studied this problem, concludes:

> ". . . in the clash of free speech and privacy interests . . . we must be careful not to allow our natural sympathy for tender psyches to beguile us into accepting serious erosion of the First Amendment. The human psyche . . . is tougher than most of its would be protectors are inclined to admit. It is generally quite capable of taking care of itself." Haiman, "Speech Against Privacy: Is There a Right Not To Be Spoken To?" 67 N.W.U.L. REV. 153, 199 (1972).

> "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment . . . . [B]ecause no interim relief was granted, the order will not have gone into effect until it was *finally determined* that the actions of Pittsburgh Press were unprotected." 413 U.S. at 390 (emphasis supplied; footnote omitted).[15]

So far from basing their actions on any such final determination as was approved in *Pittsburgh Press*, or in *Kingsley*, the courts below have acted upon no more than speculation and guesswork, that after a full trial of the action, plaintiff *might* prove to be identifiable despite the seemingly contrary finding of Special Term, and the New York courts *might* find a cause of action to exist. These speculative possibilities, the courts below have impliedly held, are sufficient to justify the granting of an injunction which necessarily, immediately and irreparably causes the greatest of harm to the First Amendment rights both of the petitioners and vast numbers of the public at large.

While it is true that this Court has occasionally sanctioned restraints upon the press, prior to final judicial determination that the material involved is unprotected, the injunction which has been issued here plainly does not meet the standards which this Court has established for the

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[15] Even with this assurance in Mr. Justice Powell's opinion for the Court, the Chief Justice nevertheless dissented on the ground that "The weighty presumption of unconstitutionality of prior restraint" was not sufficiently respected. *Id.* at 396 n.3; and see the Chief Justice's opinion for the Court in *Heller* v. *New York*, 413 U.S. 483, at 493 (1973).

imposition of such restraints. First, such restraints have been approved only in areas which have traditionally been subject to somewhat "special" treatment, as in *United States* v. *37 Photographs*, 402 U.S. 363 (1971) (border searches), and in *Freedman* v. *Maryland*, 380 U.S. 51 (1965) and *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961) (moving pictures).

In addition, such restraints as this Court has approved, even in these limited areas, have been subject to the very strictest of time limits, see, e.g. *United States* v. *37 Photographs, supra*, establishing limits of 14 days for the commencement, and 60 days for the completion, of forfeiture proceedings involving allegedly obscene materials seized by the Customs Service. The injunction here, already outstanding for over a year, hardly meets such standards.[16] Indeed, it is doubtful whether, in an action such as the present one, a court could ever act at once quickly enough, and with sufficient certainty, to satisfy the constitution. In an obscenity case for instance, such as *37 Photographs*, the fact finding task of the court is limited; a given film or book or other article must merely be reviewed, and the law applied to it. In the present case, by contrast, a vast amount of factual matter must be reviewed, comparing events in the book with events in the actual life of the plaintiff, to determine whether the plaintiff in fact is, or might, be identifiable to a reader of the book. Such information was not before the court at Special Term when it acted,

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[16] Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F.2d 82, 90 (3rd Cir. 1969): "The preliminary restraint could exist days and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat to the freedom of expression without due process of law results."

nor before any of the other courts below. It is difficult to conceive how it could have been.[17]

The courts below, it is respectfully submitted, may have acted as they have because they have permitted themselves to be rushed into judgment by plaintiff's lurid descriptions of the intimate matters which are discussed in some parts of the book.[18] But all of the courts below have simply ignored the fact that plaintiff cannot be harmed if she cannot be identified by readers, and if the book only reveals that some anonymous person related these experiences to her psychotherapist.[19]

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[17] Five days have been consumed in the deposition of the plaintiff, and one more day of examination is scheduled at this writing; objections by plaintiff's counsel have raised the necessity that rulings will have to be obtained from the court on numerous questions relating directly to the plaintiff's identification. The deposition of at least one, and possibly more, of the defendants must yet be taken, as well as possible depositions of witnesses. Even assuming attorneys—and litigants—with schedules permitting them to devote their entire time to a single case, it is nearly impossible to conceive of a final judgment occurring in less than many weeks, or even months.

[18] Plaintiff's counsel have especially delighted in quoting, to every court which has heard this case, the few lines set forth at page 4 of the Brief in Opposition to Certiorari; they are hardly typical of the 1008 pages (and 1716 footnotes) which constitute the book. Notwithstanding all of this Comstockian effort, any fair reading of the book will make it apparent that it is in fact a serious scientific case history of the treatment of schizophrenia.

[19] For similar reasons, such statutory provisions as New York Civil Practice Law and Rules §4504(a)—which relates to testimonial privilege—and New York Education Law §§6509-6511 and pursuant regulations—which relate to doctor-patient confidentiality—are irrelevant, for they plainly contemplate situations in which the patient's identity is revealed, as do such cases as *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y. Supp. 481 (Sup. Ct. 1st Dept. 1920); *Felis* v. *Greenberg*, 51 Misc.2d 881, 273 N.Y.S.2d 288 (Sup. Ct. Kings Co. 1966); and *Clark* v. *Geraci*, 29 Misc.2d 791, 208 N.Y.S.2d 564 (Sup. Ct. Kings Co. 1960).

The courts below may have also been misled by plaintiff's faulty analogy to "trade secrets" cases, as expressly relied upon, although without a single citation of case or text, by the opinion of Special Term (A83). The analogy is erroneous, however, for at least two reasons. First, in a trade secret case, disclosure of the information involved, be it a secret formula, a customer list, or whatever, would ordinarily be harmful without regard to whether the owner of the information is identified. See *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, at ——, 42 U.S.L.W. 4631, at 4633 (May 13, 1974). In the present case, by contrast, plaintiff can only be harmed if readers of the book can recognize her. Second, it is difficult to detect any First Amendment interest, which is served by disclosure of the types of information customarily involved in trade secret cases. Here, by contrast, whatever information is revealed is intimately bound up with the author's comments upon it, and upon the course of treatment, and thus with the contribution which the book seeks to make to the advancement of medical science. Indeed, if there was, as Special Term found, an "implied, if not express, agreement that confidence would be respected" (A83), such an agreement can only be implied from the usual practices which prevail in the profession of psychiatry. But any such agreement must also, then, incorporate all of the usual professional practices, including the possibility that the patient's case will contain elements which make it a desirable subject for the writing of a case history, provided, of course, that reasonable steps are taken to mask the patient's identity.[20]

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[20] Plaintiff, who has made much of the fact that she herself is a psychiatric professional (see, e.g., affidavit in support of motion, at A8-9), must be presumed even more than the ordinary patient to have been aware of the professional practice of writing case histories.

It is thus readily apparent that plaintiff offered to the courts below hardly a scintilla of support, in fact or in law,[21] for the drastic relief of prior restraint of the press which she sought from them. But those courts, so far from requiring her to meet the heavy burden which this Court has repeatedly demanded to justify such a restraint, have blatantly ignored the dictates of the First Amendment and a half century of this Court's decisions. The courts below have committed "fundamental errors—discounting the existence of a cognizable First Amendment interest and misplacing the burden of proof. . . ." *Healy* v. *James, supra,* 408 U.S. at 184-185.

The record in this case unquestionably compels a holding by this Court that the relief which plaintiff has been granted is an utterly impermissible prior restraint on the publication of a constitutionally protected work. The injunction which has now been in existence for over a year is an outrageous abridgement of the rights of both the peti-

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[21] Respondent argued below, and may urge here, that the book in question is entitled to less than the full measure of First Amendment protection because it is "commercial." Although no authority is cited, there are statements in the decision of Special Term (A84) and the Appellate Division (A104) which suggest that the argument may have been cordially received. Any such contention would be completely without merit in the light of this Court's decision in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra.* However, the special circumscribed area of "commercial speech" is ultimately defined by this Court, it is clear that there is a substantive difference between a want-ad, *Pittsburgh Press, supra,* or a commercial handbill, *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), and a book, or an advertisement for a book. ". . . [S]peech is not rendered commercial by the mere fact that it relates to an advertisement." *Pittsburgh Press, supra,* 413 U.S. at 384. "[C]ommercial activity in itself is no justification for narrowing the protection of the First Amendment." *Ginzburg* v. *United States,* 383 U.S. 463, at 474 (1966). "[I]t is of course no matter that the dissemination takes place under commercial auspices." *Smith* v. *California,* 361 U.S. 147, at 150 (1950).

tioners and the reading public, contrary to the most fundamental protections of the Constitution, and petitioners respectfully submit that the decision below must be reversed.

POINT II

Any cause of action established by the New York courts must comply with constitutional requirements.

It is of course the business of the New York courts, and the New York legislature, to determine whether that state is to accord a cause of action to patients who assert that their doctors have breached the confidentiality inhering in the doctor-patient relationship. But whether such action is labelled "invasion of privacy," or "breach of confidence" or something else, it is subject to First Amendment strictures:

> ". . . [W]e are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. [Citation omitted] Like insurrections, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional scrutiny. It must be measured by standards that satisfy the First Amendment." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, at 269 (1964) (footnotes omitted).

Just as in libel, actions within the "privacy" constellation can have no "talismanic immunity":

> "Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient

> to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, at 419-420 (1971).

See also, e.g., *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

It is apparent that the New York courts have found in this case, which is substantially one of first impression,[22] that a patient does have a cause of action for alleged breach of confidence by a doctor. It is equally apparent that they have paid little or no attention to the limitations which the Constitution imposes on any such action, and where it is this failure to give effect to the Constitution's commands which underlies the injunction in issue, the constitutional limitations on the cause of action are properly before this Court.

That a cause of action which exposes doctors to liability for the publication of case histories has First Amendment implications, would appear to be indisputable. The use of the case history is a major tool in the advancement and dissemination of medical learning. It is used regularly by psychiatrists and other doctors to enhance the knowledge of both their professional colleagues and the interested lay public. As the court of original jurisdiction noted, the first psychiatrist to publish case histories was Dr. Sigmund

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[22] Cases which have touched on similar areas have involved undisputed identification of the patient, e.g., by use of the patient's picture, *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y. Supp. 481 (Sup. Ct. 1st Dept. 1920); or by actual name, *Felis* v. *Greenberg*, 51 Misc. 2d 881, 273 N.Y.S.2d 288 (Sup. Ct. Kings Co. 1966); *Clark* v. *Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. Kings Co. 1960). Petitioners' research has revealed no case in American law in which the subject of a medical case history has brought an action alleging insufficient disguise.

Freud himself (A83). Their use has continued to be of major importance.[23]

If a doctor has met the usual professional standards for disguising the patient's identity—the standards which have been evolved over the years by the profession itself—and the patient, nevertheless, as the courts below have held, can base an action on the publication of a case history, the result will plainly be the abrupt overturning of a long-established, vital and accepted practice of medical writers, researchers and educators. A sharp reduction in case history publication—the inevitable result of the decisions below, should they be allowed to stand—will hurt not only

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[23] "The case history is an important teaching tradition in medicine." Schultz & Kilgallen, CASE HISTORIES IN SCHIZOPHRENIA (1969). "Most scientific-medical articles, case studies, case reports and clinico-pathological reports are based on actual medical experiences with patients. Medicine does not find it necessary to identify these patients." American Medical Association, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL 59 (1971). An examination of one full year's issues of leading psychiatric journals reveals that, respectively, 33% and 23% of the articles contain detailed and explicit case histories illustrating the medical matters discussed. 36 PSYCHIATRY: JOURNAL FOR THE STUDY OF INTERPERSONAL PROCESSES (1973); 28 ARCHIVES OF GENERAL PSYCHIATRY (1973). Nor is case history publication limited to psychiatry. A sampling of scholarly journals in other fields of medical specialization reveals the following comparable information: 78 ANNALS OF INTERNAL MEDICINE (1973)—45%; 82/83 JOURNAL OF PEDIATRICS (1973)—47%; 227/228 NEW ENGLAND JOURNAL OF MEDICINE (1973)—28%; 28 OBSTETRICAL AND GYNECOLOGICAL SURVEY (1973)—15%; 1973 LANCET—17%; 48 MAYO CLINIC PROCEEDINGS (1973)—28%.

Case history publication appears even more frequently in the journals of the established institutions of the American medical profession. See 225/226 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (1973)—51%; 56 MINNESOTA MEDICINE (1973)—44%; 30 ARIZONA MEDICINE (1973)—39%; 37 CONNECTICUT MEDICINE (1973)—31%; 69 OHIO STATE MEDICAL JOURNAL (1973)—53%; 70 ROCKY MOUNTAIN MEDICAL JOURNAL (1973)—51%; 73 NEW YORK STATE JOURNAL OF MEDICINE (1973)—46%.

doctors and the teaching of medicine. The ultimate loser will be the public health of the nation.[24] "As a result, organized scientific . . . research could become fragmented, and society, as a whole, would suffer." *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, at ——, 42 U.S.L.W. 4631, at 4636 (May 13, 1974).

As this Court has held, in the words of Mr. Justice Brennan, where matters of great importance to society are involved,

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government . . . . Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period'. *Thornhill* v. *Alabama*, 310 U.S. 88, 102 [1939]" *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

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[24] Section 10 of the Principles of Medical Ethics of the American Medical Association reads: "The honored ideals of the medical profession imply that *the responsibilities of the physician extend not only to the individual, but also to society*, where these responsibilities deserve his interest and participation in activities which have the purpose of improving both the health and well-being of the individual and the community." American Medical Association, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL vii (1971). (Emphasis added.)

In *Time*, the question at issue was the standard of care to be required of a publisher, in insuring the accuracy of an article concerning a matter of public interest, where the subjects of the article alleged that it contained misstatements about them, and had brought an action under the New York "privacy" statute.[25] Merely establishing the falsity of the article, this Court held, could not suffice for recovery, for "the impossible burden of verifying to a certainty" the truthfulness of every fact in such an article rendered inevitable the occasional appearance of error, even assuming the best of faith by the publisher. Therefore, erroneous statement, if "innocent or merely negligent," must be protected equally with the truth, "... if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive' ...." 385 U.S. at 388-389, citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). A standard of recovery based on absolute liability, or even on negligence, would "create a grave risk of serious impairment" of First Amendment freedoms, for even a negligence test

> "... would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference ....
>
> "In this context, sanctions against either innocent or negligent misstatement would present a grave hazard

[25] New York Civil Rights Law §§50-51, forbidding the use without consent of a person's "... name, portrait or picture ... for the purposes of trade ...." The New York Courts had already held that, as to matters of public interest, truthful reporting must be protected by the First Amendment and was not actionable. But erroneous or "fictionalized" reporting could give rise to liability. *Spahn* v. *Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), vac. on other grounds, 387 U.S. 239 (1967).

> of discouraging the press from exercising the Constitutional guarantees .... Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone,' *New York Times Co.* v. *Sullivan*, 376 U.S., at 279 . . . ; see also *Speiser* v. *Randall*, 357 U.S. 513, 526 . . . ; *Smith* v. *California*, 361 U.S. 147, 153-154 . . . ; and thus 'create the danger that the legitimate utterance will be penalized.' *Speiser* v. *Randall, supra*, 357 U.S. at 526 . . ." 385 U.S. at 389.

It is not, of course, any issue of the truth or falsity of the book, which this case presents. It is rather the reasonableness of the steps taken by the book's authors and publisher to disguise the respondent's identity, and it is the possibility of an insufficient disguise which has brought this case to the courts. The applicability to this issue of Mr. Justice Brennan's reasoning in *Time*,[26] however, would appear to be well-nigh indisputable. The publication of case histories by physicians is plainly of the greatest social importance, involving First Amendment interests of at least the magnitude of the material in *Time*, and surely deserving of no less protection. But if the author of such material can be found liable for a breach of patient confidence, upon any showing by the patient that the disguise was in-

[26] The ruling of this Court in *Time, Inc.* v. *Hill, supra*, and the reasoning of Mr. Justice Brennan's opinion for the Court, appear to be unaffected by this Court's recent decision in *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 42 U.S.L.W. 5123 (June 25, 1974). Writing for the Court in *Gertz*, Mr. Justice Powell observed that the holding in *Time* "was not an extension of *New York Times* but rather a parallel line of reasoning applying that same standard to this discrete context . . ." *Gertz, supra*, 42 U.S.L.W. at 5127, n. 5.

sufficient, and that *any* relative or friend or acquaintance of the patient could penetrate the mask, the severity of the blow to medical writing is readily apparent.[27]

Concededly, it is hardly improper to require such a writer to take some reasonable steps to disguise the subject patient. But to impose a burden of disguise so absolute that the writer must guess at, and eliminate, *every* element of the patient's life which *might* be known to others, is to impose a burden so onerous that medical writing would become all but impossible.[28]

The only standard of disguise which can possibly protect such writing with sufficient "breathing space" to satisfy the First Amendment, it is submitted, is the same standard as found applicable in *Time*: to publish an article with actual knowledge that it will identify its subject,[29] or in

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[27] The chilling effect on medical research and writing would not be limited to the psychiatric specialist. See Note 23, *supra*. But, as a distinguished scholar has observed, "The psychiatrist more than anyone else, runs the risk of being charged with professional indiscretions and is especially vulnerable to suit." Slovenko, PSYCHOTHERAPY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION 64 (1966).

[28] It may be assumed that no case history, however carefully disguised, can be absolutely and hermetically sealed from recognition against everyone. A patient's spouse, or parent, or sibling, or roommate, particularly one who knows that the patient was treated by the doctor, might be able to make the identification. Total certainty of disguise cannot be absolutely guaranteed, anymore than a total vacuum can be created within the atmosphere of the Earth. The law cannot insist that Achilles overtake the hare when it is physically impossible to do so. The question is rather one of establishing a constitutionally appropriate standard of conduct, bearing in mind the conflicting interests at stake in "the productive tension between the needs and advancement of science and the vibrant diversity of human personality." See, Ruebhausen and Brim, "Privacy and Behavioral Research," 65 COL. L. REV. 1185, 1211 (1965).

[29] By use of the patient's true name or picture, for instance.

reckless disregard of whether it will do so,[30] may properly, under the Constitution, be made the measure of liability; as with "calculated falsehood" in *Time*, it is difficult to comprehend a First Amendment interest in knowing or reckless disclosure, and petitioners do not argue that such disclosure should be protected. To permit recovery upon mere negligence, however, or even innocent failure to disguise sufficiently, is totally improper, and should not be countenanced by this Court.[31]

The courts below, however, have plainly failed to adhere to any such standard; indeed, their finding of a cause of action, and issuance of an injunction, on the record before them, appear to posit a standard of absolute liability, indeed, liability without fault.[32] The sole evidence before

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[30] By inclusion, perhaps, of some utterly unambiguous identifying characteristic, unique to the patient, which the writer well knows is a matter of which many of the patient's acquaintances are or might be aware.

[31] Indeed, this Court has in the past recognized, in a somewhat parallel circumstance where a plaintiff sought to assert a right of personalty that trenched on First Amendment interests, that Constitutional standards must be brought to bear on the issue of whether the plaintiff is sufficiently recognizable to give rise to liability. In *New York Times* v. *Sullivan*, 376 U.S. 254, at 288-292 (1964), the libel plaintiff had not been referred to by name, or official position; even the testimony of six witnesses that they had believed the allegedly defamatory statements to refer to the plaintiff, could not establish to a constitutionally sufficient certainty that the words were "of and concerning" the plaintiff so as to give rise to liability. See also *Riverhouse Pub. Co.* v. *Porter*, 287 F. Supp. 1 (D.R.I. 1968) (Pettine, J.).

[32] This Court has only recently ruled that liability without fault is an improper standard for defamation liability, because it "unnecessarily exacerbates the danger of media self-censorship." *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 42 U.S.L.W. 5123, at 5131 (June 25, 1974). Quite plainly, the doctrine which has emerged from the New York courts in this litigation thus far, that any doctor who publishes a disguised case history without prior written consent does so at his or her peril, regardless of the sufficiency of the disguise, is a doctrine of liability without fault, and will inevitably encourage medical self-censorship.

them in support of plaintiff's allegation that she can be identified consisted of two affidavits: Plaintiff's own affidavit lists at length the passages in the book which she fears will identify her (A12-17), but names not a single person who in fact had identified her after the book had been published for over a month. The supporting affidavit of a single witness asserts, "I read only a few [of *1008*] pages of the Introduction and the portion of the book called "[. . .]"[33] but immediately realized that the book was exclusively about Mrs. [Doe] and her son [. . .][34] and her former husband. There was no doubt in my mind about the identity of the persons involved" (A66). Incredibly, despite its absolute language, this affidavit refers to not a single one of the passages specified in plaintiff's affidavit as identifying her, or to any other fact in the book or in plaintiff's life which could lead to identification.

Yet it was treated by the courts below as establishing plaintiff's case to such a certainty, that all of the First Amendment's strictures, and all of this Court's decisions, and all of the interests of the medical profession and the reading public, could be totally disregarded, and a book which may constitute a major contribution to the advancement of psychiatry could be enjoined from circulation for over a year. Clearly, if the decision below is permitted to stand, the impact upon medical writing will be direct, immediate, and severely deleterious. The injunction must be vacated.

---

[33] The pseudonym used for plaintiff Doe in the book.

[34] The son's actual name; he of course also has a pseudonym in the book.

CONCLUSION

For all of the reasons set forth above, the decision of the court below must be reversed, and the injunction must be vacated.

Dated: New York, New York
August 2, 1974

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC.,

Petitioners,

v.

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC.,

Petitioners,

v.

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF

Statement of the Case

The Petitioners ask the Court to vacate a preliminary injunction that prohibited the sale and distribution of a book, "In Search of A Response", during the pendency of this action. "In Search of A Response" is, for the most part, a verbatim report of separate psychiatric sessions between a psychiatrist and her patient, the patient's former husband (who died before this action was instituted) and the patient's son (A 2-6, 11, 12).

The record was sealed in the courts below and the names in the caption are, of course, fictitious. The Petitioners, the defendants in the action, are the psychiatrist, her husband

and the publisher of the book. The Plaintiff-Respondent, the former patient of the psychiatrist, is a psychotherapist (A 8-9) and an Adjunct Assistant Professor at a major university (A 9).

The names given the patient, her former husband and her child in the book are "Helena", "Henry" and "Jan". Although those are not their real names, the patient and her family will readily be recognized as the subjects of the book, by all who know the unusual events of their lives (A 12-17).

The book reveals the following circumstances of the lives of the patient, her husband and their son: The patient's husband was a professional speech writer, he started to study law at a mature age (50)[1] and thereafter became a practicing attorney;[2] the patient is a psychotherapist[3] whose father attempted to hang himself;[4] the patient's son is musically gifted[5] and had written three operas when still quite young;[6] the patient and her former husband were divorced and he then married a physically disabled practicing lawyer.[7] The circumstances of their lives are so unique that anyone who knows the patient or her

---

[1] He had enrolled in a law school for the first time when quite young but left to become a writer (A 13).

[2] See p. 234 of the "Helena" section of the book "In Search of A Response", pp. 3, 39 of the section entitled "Henry", and the patient's affidavit (A 13, 14).

[3] "In Search of A Response", Helena section pp. 159, 179, Henry section p. 439 (A 13, 16).

[4] "In Search of A Response", Helena section p. 58 (A 12).

[5] "In Search of A Response", Helena section p. 322 (A 14).

[6] "In Search of A Response", Helena section p. 344 (A 14).

[7] "In Search of A Response", Henry section pp. 477, 480, 486, 546, 593 (A 16-17).

son, or who knew her former husband, would have little difficulty in recognizing them as the people of the book.

Petitioners state (at pages 8-9, and page 30, of their brief) that the steps taken by the psychiatrist to disguise the identity of the patient and her family met "the usual professional standards" in masking the patient's identity. And in their statement of questions presented, the Petitioners refer to a "finding by the Court which issued the injunction that the identity of the patient had been disguised in accordance with the usual professional standards . . ."[1] The Appellate Division of the Supreme Court of the State of New York issued the injunction under review (A 128) and it did not find that the patient's identity had been disguised in accordance with professional standards or any other standards. The court of first instance did state that Petitioners met the "usual" standards for disguising a patient's identity (A 83), but the order of that court was modified and superseded by the order of the Appellate Division (A 106). The proposed *amicus* brief of the American Psychiatric Association, the American Psychoanalytic Association, and the American Orthopsychiatric Association, arbiters of the standards of the profession, states, "Contrary to petitioner's completely unsupported assertions, this book does not meet 'the usual professional standards for disguising a patient's identity—the standards evolved over the years by the profession itself . . .'."

The Petitioners argue that the question of whether the patient can readily be identified as the Helena of the book, is one of fact; that the fact was in dispute in the court below (A 55-56, 65-66, 12-17) and that the dispute has not been resolved (Petitioners' brief, pages 4, 5). The statement that the dispute has not been resolved is misleading. For

[1] Question 1(B) at p. 2 of Petitioners' brief.

the purpose of this proceeding, it must be assumed that all factual disputes were resolved in favor of the patient.[1] It must therefore be assumed that a reader of the book who

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[1] Because of the manner in which Petitioners proceeded, the New York Court of Appeals (the highest court of the State) was required to assume that all disputed facts in the record had been determined in favor of the patient. The Petitioners did not, when they asked leave to appeal to the Court of Appeals, raise any factual issue. They asked for a reconsideration only of the questions of law that they thought were dispositive of the case (A 123). Accordingly, the order of the Appellate Division of the Supreme Court of the State of New York (an intermediate appellate court) granting leave to appeal did not set forth any findings of fact, and certified that the Court's determination was made as a matter of law (A 125). When an appeal is taken to the New York Court of Appeals, and a final judgment or order is not entered pursuant to the order of the Appellate Division, and no findings of fact are made in the order granting leave to appeal, as in this case (A 106-108, 123), the jurisdiction of the Court of Appeals is limited under the New York State Constitution, Article 6 §3, to a review of questions of law only. All controverted issues of fact not set forth in the orders and opinion of the Appellate Division must be presumed, under the statute governing appeals to the New York Court of Appeals (CPLR 5612(b)), to have been determined in favor of the Respondent. There are no findings or statements of fact in the opinion or order of the Appellate Division (A 103-108) or in the order granting leave to appeal (A 124-125). The Court of Appeals was therefore required, under the law, to assume that all disputed facts in this case had been determined in favor of the patient, *Chaplin* v. *Selznick*, 293 N.Y. 529, 58 N.E. 2d 719.

The Practice Commentary on CPLR 5612(b) states, "The vigor and consequences of the presumption [that all disputes with respect to the facts not set forth in the orders of the Appellate Division shall be deemed resolved in favor of the respondent] are self-evident. The appellant 'must see to it that the statements required by the Statute are made by the Appellate Division. Otherwise all questions of fact or discretion are deemed resolved against him'." 7B McKinney's Consolidated Laws of New York, Civil Practice Law and Rules, CPLR 5101 to 6000, p. 536 (matter in brackets added).

When an order of a state court is under review, this Court must judge the state court order on the basis of "what the [state] court had properly before it in such proceeding," *Carter* v. *Illinois*, 329 U.S. 173, 176 (matter in brackets added).

Note: Article 6 §3 of the New York State Constitution, and all New York Statutes and Regulations referred to in this brief, are printed in the appendix to the brief.

knew about the patient, would have known that the book related to her and her former husband.

The psychiatrist treated the patient, her husband and their son from 1956 to 1963 (A 10). The patient and her husband told the psychiatrist the intimate details of their lives and their secret thoughts and their fantasies (A 10, 67). The psychiatrist's husband wrote in the Introduction (at page viii), that the book consists of the notes, "reproduced as closely as possible", of hundreds of the patient's and her husband's therapy sessions.

The psychiatrist contends and the patient denies that the patient, while under therapy, gave oral consent to the publication of the book (A 27, 69-70). Both agree that the psychiatrist requested, and the patient refused, to give written consent. If consent had been given during therapy as the psychiatrist claims, it would have been inefficacious for there was little likelihood of informed, voluntary agreement at that time, in view of the patient's emotional dependency upon the psychiatrist during treatment and the submissive attitude induced by therapeutic treatment.[1]

The Petitioners say that the Court at Special Term, to the extent that it resolved the question of whether consent had been given, resolved it "largely in the petitioners' favor" (Petitioners' brief at pages 4, 5). The Court in fact said:

> "I pay no attention to the alleged (and disputed) implied-in-fact consent of plaintiff to publication ten years ago. A doctor who wishes to publish confidential

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[1] H. Jonas, *Philosophical Reflections on Experimenting with Human Subjects*, 98 Daedalus 219, 237-239 (Journal of American Academy of Arts and Sciences, 1969). "The reality is that informed consent is often exceedingly difficult or impossible to obtain in any real sense." H. K. Beecher, *Consent in Clinical Experimentation—Myth and Reality*, 195 Journal of the American Medical Association (1966), pp. 34-35.

> material about his patient and relies on the patient's consent should take care to get that consent in clear, unambiguous written form." (A 84).

We do not believe that was intended as an endorsement, or a qualified endorsement, of the psychiatrist's position.

The psychiatrist, to discourage further investigation of her publication of the patient's confidential communications, wrote to an attorney for the patient suggesting that the reports that the psychiatrist was publishing a book were merely "rumors", and that the patient was mistaken in assuming that a book by the psychiatrist would be about her (A 20, 21). At the time the psychiatrist's letter was written, the book was being printed. The psychiatrist later admitted that the book was in fact about the patient and her family, and only about them (A 29). The patient did not learn of the publication of the book until it was on sale in department stores and other sales outlets, a few months after the psychiatrist's letter was received (A 73).

The Appellate Division held that the alleged oral consent of the patient did "not provide a sufficient valid basis for denying the application [for a preliminary injunction]" (A 104, matter in brackets added). If the order of the Appellate Division did not dispose of the issue, the dispute must be deemed to have been determined in the patient's favor, and the Court must assume that the patient did not consent to publication (see discussion at page 4 fn. 1 of this brief).

The Introduction to the book is a panegyric on the psychiatrist, and advertises her extraordinary talents. The writer of the Introduction, the psychiatrist's husband, refers to her lovingly at "*my* beautiful L—" (emphasis ours). Recounting the coming together of, and the alleged immediate warm relationship between, the psychiatrist and

the patient's child, the psychiatrist's husband writes, "I walked away rapidly—I could not contain the surge of emotion, the unbearable anguish. I do not know how my beautiful L— could hear all this and not burst into tears." The Introduction also compares the psychiatrist's understanding of her patients with St. Francis of Assisi's understanding of the language of the birds (pages ix-xi of the Introduction).

The nature of the information confided to the psychiatrist and published in the book, may be gathered from the following passages:[1]

> "I used to see my mother nude—lovely body, unused body. Two things I used to mind—her breasts sagged and there was a great big lump under her left breast. I would worry about it—that it is cancer. Also—the lips of her vagina or her clitoris hung—long and dark—it looked so awful. What was it? Looking at a woman's vagina could not give a man pleasure—I can't believe that he gets pleasure from it. It is a place to go. I never showed my vagina to any man. No man has ever asked to look at my vagina. Cunnilingus is too anxiety provoking—I feel I will be rejected. I can't do fellatio—I can't stand it."
> (Helena section at p. 65)

• • •

> "This is the way I have been achieving orgasms—it is frightening. I have a sense of loss of immediate contact—it is not happening between me and Henry, but between me and the fantasy. Will I need the fantasy for the rest of my life to enjoy sex? Henry's body is not stimulating to me any more—something is robbing me of becoming excited by him. I just want to

[1] There are other parts of the same kind.

be more sinful with him—lewd—I like to say things to him, or if I do say—he should respond—but he doesn't. I would like to have a homosexual relationship—then I wouldn't have to have a fantasy or be lewd or sinful."
(Helena section at p. 100)

• • •

"I wanted to sleep with him [her husband], he said he was very tired. I was very aroused. He tried—he got soft. Then we tried again. For a while I couldn't stand it, 'Either you sleep with me right now or I can't stand it, I won't work on it, either yes or no. Even if I don't get aroused immediately I am ready to go.' He then entered me, but he was tense and had difficulty controlling himself. I said, 'Don't worry, this is better than nothing.' . . .

"Henry finished but I didn't. He banged on the bed, ran to the window and looked out. I felt my vagina, it was very hot and very wet—I said 'I am alive again.'
"Henry went to sleep and I masturbated . . ."
(Helena section at pp. 262, 263)

The advertisements for the book reflect the spirit of the text. They appear to be announcing a cheap novel. One advertisement described the book as a "symphony of feeling" (A 23). Another, in The New York Times, assured readers that the book would be a "sheer pleasure" and an "intense experience" (A 84). A third promised that "anyone who opens [the book] will get pulled in" (A 22).

The patient's motion for a preliminary injunction restraining the Petitioners from advertising, selling and distributing the book during the pendency of the action, was made at a Special Term of the Supreme Court of the State of New York (A 25). That Court, after consider-

ing the evidence and hearing argument (A 93, 94), granted a limited preliminary injunction restraining sale of the book through general trade channels, but permitting sale and distribution through universities, medical schools and outlets specializing in medical, psychiatric and scientific works (A 95). The limited preliminary injunction was granted approximately three months after publication.[1]

In granting the limited injunction, the Court at Special Term wrote: "As the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure, defendants should not attempt to distribute the book for other purposes." (A 84). The Court also gave the psychiatrist and the patient leave to apply for an immediate trial (A 95, 96).

Despite the psychiatrist's protestations that her purpose in publishing the book was to impart medical knowledge and to advance the professional practice of psychiatry (A 27, 29-30), she was unwilling to accept a distribution designed to reach psychiatrists, students, and scientists and she insisted that she had the right to sell the book to the general public. The psychiatrist rejected the offer of an immediate trial,[2] and appealed the order granting the injunction to the Appellate Division of the New York State Supreme Court (A 100).

Throughout their brief, Petitioners indicate that the book has great scientific and medical importance. In the concluding paragraph of their brief, Petitioners write that the book "may constitute a major contribution to the advancement of psychiatry" and they warn the Court that

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[1] The book was put on sale February 12, 1973 (A 34) and the limited preliminary injunction was ordered May 4, 1973 (A 86).

[2] See discussion at pp. 26, 27 of this brief.

if the preliminary injunction obtained by the patient is not vacated, "the impact upon medical writing will be direct, immediate and severely deleterious."[1] A reading of the book will reveal those statements to be solemn nonsense, but the scientific value or lack of value of the book is not in issue. The book was described by the Court below[2] as a "commercial" book (A 103), not because a book published for profit is "entitled to less than a full measure of First Amendment protection",[3] but because the way in which the book was exploited and sold, and the Petitioners' conduct in this case, led to the conclusion that the book was not, as the psychiatrist now maintains, a scholarly dissertation intended for the scientific community (A 104). As the Court said in *Ginzburg* v. *United States*, 383 U.S. 463 at p. 470, "[T]he circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes."

The question before the Court in *Ginzburg* was whether material which, standing alone, might not be held obscene, could be held obscene in the context of advertising in which it was presented. The material included a handbook that had been sent to medical and psychiatric associations and that was said, by witnesses at the trial of the action, to be

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[1] Petitioners' brief at p. 36.

[2] The reference to the Appellate Division of the Supreme Court of the State of New York as "the Court below" is appropriate. Though the order under review is the order of the New York Court of Appeals, that court merely affirmed the order of the Appellate Division and held that it was "properly made" (A 127, 125).

[3] See discussion at p. 27, fn. 21 of Petitioners' brief.

a valuable adjunct to therapy. The Court, in holding the claimed scientific utility of the publications was not controlling in view of the defendant's "own evaluation" in his advertisements, noted, in language applicable to the Petitioners' conduct and advertising in this case, "Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; . . . " (383 U.S. at p. 472).

The Appellate Division found in its decision in this case, that there was "no justification for the distinction . . . drawn between 'scientific readers' and the general public" (A 104), and it modified the order of the *nisi prius* court by enjoining all distribution of the book pending the trial of the action (A 107). The Court, commenting on the patient's right of action against the psychiatrist, wrote:

> "In light of the expanding recognition of invasion of privacy actions (*cf. Griswold* v. *Connecticut*, 381 U.S. 479; *Roe* v. *Wade*, —— U.S. —— [41 U.S.L.W. 4213]; *Nader* v. *General Motors Corp.*, 25 N Y 2d 560), and in view of the confidentiality accorded the physician-patient relationship, we believe that plaintiff has alleged a cognizable claim for relief and has made a sufficient showing to warrant the granting of the provisional remedy requested" (A 104-105).

The Appellate Division also ordered an early trial upon application of either party (A 108). Again, Petitioners did not seek an early trial, but requested and secured leave to appeal to the New York Court of Appeals. The order of the Appellate Division granting a preference for an early trial (A 108) is still in effect.

Questions 1(B), 2(A), 2(B) and Part of Question 1(A) of the Questions Presented in Petitioners' Brief Should Not Be Considered, For the Questions Are Not Properly Presented.

Questions 1(A) and 1(B) presented in Petitioners' brief are:

> "1(A). Whether the courts below erred in holding that it was not an invalid prior restraint upon freedom of the press, in violation of the First Amendment, to grant a preliminary injunction, completely prohibiting the distribution and sale of a concededly truthful, non-obscene book concerning matters of scientific and medical interest and importance, *particularly where the factual grounds alleged in support of the injunction remain disputed and unresolved.* (Emphasis added.)
>
> "(B). Whether such a prior restraint is constitutionally permissible in the case of a former patient seeking to enjoin publication of an over-10-year-old disguised case history, where the patient claims she is identifiable, notwithstanding the finding by the Court which issued the injunction that the identity of the patient had been disguised in accordance with the usual professional standards in case history publication."

The italicized portion of question 1(A) assumes there were unresolved disputes with respect to facts alleged in support of the injunction.[1] As shown at page 4 fn. 1 of this brief, the factual premise of the question is incorrect. All disputes of fact were resolved in the patient's favor.

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[1] Petitioners do not maintain that there is no evidence in the record to support the Respondent's allegations. They claim that the Court below should not have affirmed the preliminary injunction because they disputed some of the statements made in support of the injunction, and they maintain that the factual conflicts were not resolved (see Petitioners' brief at p. 21).

The New York Court of Appeals could not, in reaching its decision in this case, have assumed that any factual dispute remained open and unresolved (CPLR 5612(b)). As the New York Court of Appeals did not pass upon, and could not have passed upon, the question of whether a preliminary injunction may be granted when issues of salient fact are still open, this Court may not do so. *State Farm Mutual Auto Ins. Co.* v. *Duel*, 324 U.S. 154, 160-161.

We do not believe this Court has jurisdiction to consider Question 1(B) in Petitioners' brief, for the question does not relate to the order under review. The question refers to "the finding by the Court which issued the injunction that the identity of the patient had been disguised in accordance with the usual professional standards . . ." The Appellate Division issued the injunction under review (A 128) and as stated earlier, it did not find that the patient's identity had been disguised in accordance with professional standards.[1] The factual postulate of the question is therefore false. The question 1(B) also assumes that there was an unresolved conflict with respect to a material fact. For the reasons just discussed, that conflict must be deemed to have been resolved in the patient's favor.

The Petition for a Writ of Certiorari presented (at page 2) the single question:

> "Whether the courts below erred in holding that it was not an invalid prior restraint upon freedom of the press, in violation of the First Amendment to the United States Constitution, to grant a preliminary injunction, completely prohibiting the distribution and sale of a concededly truthful, nonobscene book concerning matters of scientific and medical interest and importance."

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[1] See discussion at p. 3 of this brief.

Petitioners are attempting to present two additional questions (numbered 2(A) and 2(B) in their brief) that are not fairly comprised in the question presented in the Petition for a Writ. Those additional questions are:

> "2(A). Whether a state, if it grants to a patient a cause of action for alleged breach by a doctor of the confidential doctor-patient relationship, must limit such a cause of action in compliance with Constitutional standards.
>
> "(B). Whether the New York courts, in granting the injunction herein, have established a cause of action which does not, in fact, comply with Constitutional requirements."

Under Rule 23(c) of the Rules of this Court, only the questions presented for review in the Petition for a Writ of Certiorari, or fairly comprised therein, will be considered by the Court. *General Talking Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 177-178. Petitioners cannot now enlarge upon the question presented in the Petition for a Writ.

It cannot be said that the Petitioners intended to include the questions 2(A) and 2(B) in the question presented in their Petition, for that intent was disavowed. The Petitioners after expressing doubt in the Petition[1] with respect to the patient's rights of action against the psychiatrist for breach of the doctor-patient relationship, and for invasion of the patient's right of privacy, wrote, "Obviously, this certiorari petition is not the occasion for that debate since there are unsettled questions of state law involved as well as intermingled Federal questions."[2]

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[1] Petition for a Writ of Certiorari at p. 11.

[2] Petition for a Writ of Certiorari at p. 12.

The only question properly presented for review in this case is whether a preliminary injunction against distribution and sale of a truthful, non-obscene book, said to be on a scientific subject, is an impermissible prior restraint prohibited by the First Amendment. The Petitioners' broadside attack on preliminary injunctive relief in civil actions is similar in breadth to the challenge to licensing laws made and rejected in *Times Film Corp.* v. *Chicago*, 365 U.S. 43.

Summary of Argument

I

The Petitioners ask the Court to vacate a preliminary injunction restraining the distribution and sale of a book. Petitioners claim the preliminary injunction imposes an unconstitutional prior restraint on communication.

The preliminary injunction is not an unconstitutional prior restraint, for it was ordered after a court hearing in which evidence was submitted by both parties and in which procedural due process was accorded.

The preliminary injunction has been in effect for approximately a year and four months. The duration of the interlocutory injunction is due entirely to the series of appeals taken by Petitioners, who did not accept the offer of an immediate trial made when the preliminary injunction was granted.

The granting of an injunction restraining the sale of a book in a case such as this, is not an infringement of First Amendment rights. Injunctions prohibiting communication have been granted in many cases when the party enjoined has been guilty of wrongful conduct connected with the communication. The injunction was sought and granted to prevent the continuance of the wrong.

II

One of the Petitioners is a psychiatrist, and the Respondent had been one of her patients. The book involved in this case is in large part a verbatim report of the patient's, and her former husband's, disclosures to the psychiatrist during their treatment.

In publishing the patient's confidences, the psychiatrist ignored her statutory obligation as a physician to keep inviolate the patient's confidences communicated during the course of treatment. The patient has a right of action against the psychiatrist for the psychiatrist's breach of the physician-patient relationship.

The recognition and enforcement of the patient's right of action against the psychiatrist for revealing confidential communications does not infringe the constitutional guarantee of free press. The Constitution does not protect speech that is itself an infraction of a valid statute enacted in the public interest.

III

The psychiatrist's publicizing of information about the patient's sexual fantasies and her private opinions, attitudes and emotions was an invasion of the patient's constitutional and common-law rights of privacy. The patient is not a public or newsworthy person. The psychiatrist's claim that she attempted to shield the patient from recognition by taking steps to disguise the patient's identity is not a defense to the patient's action for the intrusion upon her privacy, particularly because the psychiatrist's revelations about the patient were so intimate and so unwarranted "as to outrage a community's notions of decency."

POINT I

The preliminary injunction granted in this case after an adversary hearing is not an unconstitutional prior restraint on communication.

"The phrase 'prior restraint' is not a self wielding sword. Nor can it serve as a talismanic test."

—Mr. Justice Frankfurter[1]

As Petitioners argue at some length, there is a rebuttable presumption that prior restraints on communication are invalid. But there are great differences between the term "prior restraints" as the courts have used it in applying the constitutional rule, and the term as it is used in the Petitioners' brief.

The doctrine against prior restraints was developed and applied to prevent unwarranted government interference with communication. Constitutional opposition to previous restraints was directed originally against laws requiring government approval of books before they could be published. *Lovell* v. *Griffin*, 303 U.S. 444, 451-452. The constitutional rule has been expanded, *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U.S. 376, 382. The term prior restraint is now used by this Court to identify a curb on communication imposed by law or originated by an agency of the government, where there is no assurance of an adversary court proceeding to test the validity of the restriction before, or immediately after, it is imposed. *Near* v. *Minnesota*, 283 U.S. 697; *Lovell* v. *Griffin*, 303 U.S. 444; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58; *A Quantity of*

[1] Opinion in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 at p. 441.

Books v. *Kansas*, 378 U.S. 205, 210-211, 213; *Freedman* v. *Maryland*, 380 U.S. 51; *Carroll* v. *Princess Anne*, 393 U.S. 175; *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 367; *Heller* v. *New York*, 413 U.S. 483; *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U.S. 376, 389-390. "The special vice of prior restraint," Mr. Justice Powell wrote in *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U.S. 376, 390, "is that the communication will be suppressed either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."

The Petitioners attempt in their brief in this case, to further extend the constitutional rule against prior restraints to cover virtually all orders in private actions enjoining the publication or distribution of communications that are not obscene or untruthful. There isn't any case law or legal authority to support their position.

Petitioners write, at page 17 of their brief, that the sole case known to them in which "this Court ever approved a form of prior restraint of circulation of the printed word is *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 . . . ." (In Petitioners' private lexicon, any injunction is a "form of prior restraint".)[1] We assume Petitioners limited the statement in the interest of accuracy, to a "restraint of *circulation* of the *printed* word" (emphasis ours). With that limitation, the statement has little significance, for as Petitioners know, there are many cases in which this Court, and other courts, approved injunctions against spoken communication, and communication through picketing, in motion pictures and other media. Some of those cases are outlined on the following pages. The doctrine of those cases applies, of course, to circulation of the printed

[1] The case cited relates to preliminary and final injunctions.

word. As Mr. Justice Clark wrote in *Burstyn* v. *Wilson*, 343 U.S. 495, 503, "Each method [of communication] tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." (Matter in brackets added.)

In *Kewanee Oil Company* v. *Bicron Corporation*, —— U.S. ——, 42 U.S.L.W. 4631, this Court reinstated an injunction against the disclosure of trade secrets (of scientific value) by a former employee of the petitioner. In *Kewanee Oil Company*, as in the case at bar, the injunction was requested to prevent disclosure of information given in confidence. The information was confided, in both cases, in connection with the employment of the person enjoined. Mr. Chief Justice Burger, writing for the Court in *Kewanee Oil Company*, drew a significant parallel between a state's power to regulate trade secrets and its power to regulate writing.

In *United States* v. *Marchetti*, 466 F.2d 1309, *cert. den.*, 409 U.S. 1063, the defendant, a former employee of the Central Intelligence Agency, was enjoined from publishing a book disclosing information that he had sworn to keep secret and that he received in connection with his work.

In *Clayman* v. *Bernstein*, 38 Pa. D & C 543, a doctor took photographs showing his patient's facial disfigurement. The Court held, in sustaining the complaint for an injunction prohibiting further dissemination of the photographs by the doctor, "The powers of equity are not so impotent that such a situation will be tolerated. The remedy afforded must be such as to destroy the roots of the evil and this can only be done by mandatory injunction" (at p. 550).

In *Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E.2d 610, the Court in affirming an injunction against distribution of a documentary film about conditions in a state mental institution, said: "[The film is an] indecent intrusion into the most private aspects of the lives of these unfortunate persons in the Commonwealth's custody . . ."[1]

In *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N.Y. Supp. 800, *aff'd*, 261 N.Y. 504, the Court enjoined distribution of a motion picture that violated plaintiff's statutory right of privacy.

In *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287, this Court sustained an injunction against communication through peaceful picketing because earlier acts of violence gave the picketing a coercive effect. See also *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, discussed at page 40 of this brief.

In *Rowan* v. *Post Office Dept.*, 397 U.S. 728, the Court sustained the validity of a statute that called for the issuance of orders prohibiting a mailer from sending any mail to one who complained that a letter previously received from the mailer was erotically arousing.

In *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, this Court held a law providing for the issuance of a civil injunction against exhibition of obscene material, to be valid.

Kingsley Books, Inc. v. *Brown*, 354 U.S. 436, involved a statute that authorized the issuance of a preliminary injunction (and a permanent injunction after trial) against distribution of obscene matter. The Court held that the statutory scheme was not an unconstitutional prior restraint on the press. Mr. Justice Frankfurter wrote for the Court in *Kingsley Books, Inc.* v. *Brown*, referring to the

[1] 249 N.E. 2d at 615.

phrase "prior restraint", 354 U.S. at pp. 441-442, "The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties. 'What is needed,' writes Professor Paul Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particular analysis.'"

In his concurring opinion in *New York Times Co. v. United States*, 403 U.S. 713, Mr. Justice White gave the following example of circumstances in which injunctive orders against communications have been approved (403 U.S. at p. 730 fn. 1):

> "The National Labor Relations Board routinely issues cease-and-desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. See 29 USC § 160(c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 USC § 45(b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, e.g., NLRB v. Gissel Packing Co. 395 US 575, 616-620, . . .
>
> "[N]o one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See Westermann Co. v. Dispatch Co. 249 US 100 . . .
>
> ". . . [A]nd when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the

affairs of government, a request admittedly not based on any statute."

In each of the cases just outlined in which the Court enjoined communication, the conduct of the defendant, not the communication, was the central issue. That is also true of the instant case. The psychiatrist, not her book, is on trial here.[1] The communication was not enjoined because it expressed an idea that is disapproved, or because of some quality of the expression. The book was enjoined temporarily, and it is hoped it will be enjoined permanently, because the publication involved a breach of the trust imposed in the psychiatrist by one who turned to her for help, and because it exposed a private person's private life to public view.

Petitioners refer to *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, as "an irrelevant obscenity case."[2] The assumption that the opinion is irrelevant because the books involved in the case were said to be obscene, betrays a misunderstanding of the doctrine relating to prior restraints. The term "prior restraints" refers to the means or method of restraint, not to the reason for the restriction or the nature of the objections to the communication. The constitutional objection to prior restraints, as previously noted, is that they do not afford adequate proceedings in advance of suppression, or immediately thereafter, for determining whether the material in question is constitutionally protected, or may be proscribed. See cases cited at pages 17 and 18 of this brief.

If one accepts Petitioners' premise that prior restraints may be countenanced whenever a work is said to be obscene,

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[1] See *Roth* v. *United States*, 354 U.S. 476, 495, concurring opinion of Mr. Chief Justice Warren.

[2] Petitioners' brief at p. 10.

then all one need do is make that accusation against the book "In Search of A Response" (for which there is warrant).[1] The Petitioners would not, in their view, then be in a position to claim that the preliminary injunction in this case constituted an impermissible prior restraint.

The Petitioners do not complain that the proceedings below failed to "ensure the necessary sensitivity to freedom of expression," *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 367. The procedures governing the application for and issuance of preliminary injunctions in New York State, followed in this case, meet the requirements of due process and the demands of the First Amendment.

The preliminary injunction against further sale of the psychiatrist's book was made after an adversary hearing. Such injunctions may not be granted *ex parte* (CPLR 6311). The application for an injunction was made by an order to show cause served personally on Petitioners (A 26). The psychiatrist had notice of the proceedings and ample opportunity to present relevant evidence before a judicial determination was made. Although the order to show cause was returnable four days after service, it was adjourned thirteen days (A 86) to afford the Petitioners time to prepare their defense. The parties had ten days after the adjourned hearing date to submit additional evidence (A 87). The limited preliminary injunction was granted by the court of first instance approximately one month after all evidence had been submitted (A 86).

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[1] Petitioners' report (at p. 17 of their brief, fn. 7) of the oral argument of counsel for the patient is in part inaccurate. Counsel for the patient did not say that the book could not be attacked as obscene. He said the book was not challenged on that ground. The report is accurate in stating that the word "quackery" was used to characterize the psychiatrist's self-advertising.

The New York statute governing the issuance of preliminary injunctions provides for the submission of affidavits and other evidence on the application for the remedy (CPLR 6312). Affidavits on such motions must follow the rules of evidence and must be on knowledge. *City of Utica* v. *Mercon Inc.*, 71 M. 2d 680, 336 N.Y.S.2d 880, 883. When there is conflict with respect to critical facts on a motion, oral proof may be taken and witnesses may be subpoenaed, examined and cross-examined. *Dege* v. *Mascot Realty Corp.*, 243 App. Div. 546, 275 N.Y. Supp. 884; *Dache* v. *Abraham & Straus*, 187 Misc. 1001, 1003, 66 N.Y.S.2d 787, 789. A full testimonial hearing (before a jury, if the issue is triable of right by jury) may be ordered with respect to disputed facts, upon application of any of the parties (CPLR 2218). The Petitioners did not ask for a testimonial hearing in this case.

One seeking a preliminary injunction in the New York State courts has the burden of proving the existence of a valid cause of action against the defendant (*Rohaver* v. *Killiam*, 37 A.D.2d 547, 322 N.Y.S.2d 589), in this case that the psychiatrist's book violated the patient's rights.[1] And

[1] The Petitioners state (at p. 6 of their brief), that "the lower courts" held that Petitioners must bear the burden of justifying the publication of the book. There is no basis for that statement. The claimed justification for the assertion is the statement in the decision of the Court at Special Term, "As the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure, defendants should not attempt to distribute the book for other purposes." (A 84). See Petitioners' brief at p. 10. It will be recalled that that determination of the Court at Special Term was overruled by the Appellate Division (one of the "lower courts"). Also, it is clear that Petitioners distorted the meaning of the Special Term decision. The Court obviously did not hold that the Petitioners had the burden of proving their right to publish, but referring to Petitioners' claimed justification for having published the book in violation of the doctor-patient privilege, limited the sale to the audience for which, the psychiatrist said, the book was intended.

it must be shown before an injunction is granted, that the movant will suffer irreparable injury if the preliminary injunction is not granted. *McGillicuddy* v. *Monaghan*, 280 App. Div. 144, 112 N.Y.S.2d 792.

A party obtaining a preliminary injunction in a New York State court is required to file an undertaking to pay all damages and costs that may be sustained by reason of the injunction, if after a full trial it is determined that the moving party is not entitled to an injunction (CPLR 6312 (b)). In the instant case, the patient was required to file a bond to assure performance of the undertaking (A 95). The amount of the bond was increased by the Appellate Division on the appeal to that Court (A 107).

In accordance with New York practice when a preliminary injunction is granted, the parties in this case were permitted to proceed to trial immediately (A 95, 96, 107, 108). The psychiatrist refused to take advantage of the opportunity.

One may appeal as a matter of right to the Appellate Division of the Supreme Court of the State of New York from an order granting a preliminary injunction, and the psychiatrist did appeal (A 100). The Appellate Division is required to review questions of fact and of law raised on such appeals (CPLR 5501(c)).

It is clear that the injunction granted in this case cannot properly be described as an unconstitutional prior restraint. There was an adversary hearing in court, with all procedural safeguards afforded, before the preliminary injunction was granted, and an immediate plenary trial was offered thereafter. The Petitioners could have had a testimonial hearing on the motion for a preliminary injunction, but did not request it. In any event, there is no requirement that the adversary hearing "be a fully matured action at

law." *Fontaine* v. *Dial*, 303 F. Supp. 436, 440, fn. 7, *appeal dismissed*, 399 U.S. 521.

The psychiatrist complains repeatedly in her brief that the preliminary injunction has been in effect for more than a year and that the case has not yet been tried. But the psychiatrist was solely responsible for the delays, and has no valid reason to complain about them. In May 1973, shortly after the limited injunction was granted, the patient sought an early trial (A 97). The psychiatrist's attorneys wrote the judge to whom the case had been assigned, "We do not join in any application for an immediate trial," and gave as their reason the necessity for extended examinations before trial (A 98, 99).

The Petitioners write, at page 6 of their brief, that they sought at every stage to expedite the proceedings in the state courts. There is nothing in the record to support that statement and it is not correct. Petitioners say (at pages 24 and 25 of their brief) that an early trial was not feasible because of the "vast amount of factual matter" to be reviewed, and they note (at page 25 of their brief) that six days will have been "consumed" in their interrogation of the patient. The interrogation was needlessly prolonged and could, in any event, have been taken on consecutive days.[1] The Petitioners' examination before trial of the patient in this case has not yet been completed, though it began early in 1973. Letters sent to Petitioners' attorneys asking them to set dates for the completion of the examination were not answered. It was not until counsel for the patient moved on July 3, 1974 for a protective order terminating the examination, that the psychiatrist's attorneys

[1] Petitioners indicate (at p. 25 fn. 7 of their brief) that counsel (Petitioners') and the litigants (Petitioners) may not be able to devote their entire time to a single case. If so, they may not complain of the consequent delays.

agreed to conclude it after one further session. The three successive appeals taken by the psychiatrist also precluded a trial during the period following the granting of the first limited injunction.

The psychiatrist, having been solely responsible for the length of the period the preliminary injunction has been in effect, cannot complain that she has been denied a prompt full trial of the issues in this case. As Mr. Chief Justice Burger wrote in *Heller* v. *New York*, 413 U.S. 483 at pp. 490, 491:

> "Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of 'promptness' those delays caused by the choice of the defendant. See United States v. Thirty-seven Photographs, supra, at 373-374. In this case, the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision . . . Cf. Kingsley Books, Inc. v. Brown, 354 U.S. at 439 . . ."

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The substance of Petitioners' argument in Point I of their brief is that an injunction against publication granted after a full trial is an improper prior restraint, and a preliminary injunction, granted before an action is tried, is "an all the more egregious violation of the First Amendment."[1] Injunctive relief *pendente lite* is granted in New York when a final judgment would be ineffectual if preliminary relief is not afforded (CPLR 6301). There was a

[1] Petitioners' brief at p. 20. (There isn't any citation of authority for the statement.)

critical need for the relief in this case, for if it had not been granted, a judgment in the patient's favor after trial would have been academic. A final judgment enjoining the sale of "In Search of A Response" would not be meaningful years[1] after the patient's personal and private thoughts and experiences were being published and sold, and advertised as a "symphony of feeling" and as giving "sheer pleasure."

To deny state courts the right to grant preliminary injunctive relief in all cases involving communication would take from the states the power to grant adequate relief in cases where the final judgment would be empty if interlocutory relief were not granted. Money damages will not, in a case such as this, restore a plaintiff's dignity, or her place in society, and they cannot compensate for the loss of her self-esteem and the esteem of others.

It cannot reasonably be maintained that granting a preliminary injunction against the book in this case will have a chilling effect on the right of expression. "[A] pragmatic assessment of its operation (that is, the operation of the injunction) in the particular circumstances"[2] of this case indicates, at most, that doctors who divulge their patients' secrets to the world will be faced with the possibility of an order in a civil suit prohibiting them from continuing to do so.

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[1] That is the Petitioners' estimate (at p. 6 of their brief) of the duration of the trial and appeals. The estimate is a conservative one in view of Petitioners' glacial pace in conducting pretrial proceedings.

[2] *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 442; matter in parentheses ours.

The Authorities Relied On By Petitioners Do Not Support Their Position That An Injunction In A Private Action, Granted After A Preliminary Adversary Hearing, Is A Prohibited Form of Prior Restraint.

Petitioners virtually rest their case on the decision in *Near* v. *Minnesota*, 283 U.S. 697. "Any analysis of prior restraint must begin," they write, "and indeed can nearly end with the Court's opinion [in that case]."[1] As is evident throughout its opinion, the Court in *Near* was concerned with a statutory censorship system.[2] The Court stated specifically that it was not passing upon, and was not concerned with, the question presented here, that is, "the extent of authority to prevent publications in order to protect private rights according to the principles governing . . . courts of equity."[3]

The statute struck down in *Near* authorized public officials to maintain an action to enjoin the publication of a newspaper (including the publication of future editions) if it was found that the periodical had been devoted largely to malicious and defamatory matter. The statute permitted an injunction against publication of true charges of corruption against public officers[4] unless the publisher proved to the satisfaction of the court that the charges were published with good motives and for justifiable ends. The burden of proving that the publication was justified, was on the publisher. The statute also provided for the issuance of *ex parte* injunctions pending a hearing, and for permanent injunctions after trial.

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[1] Petitioners' brief at p. 11.

[2] See opinion in *Near*, 283 U.S. 697, pp. 701, 707, 708-713, 720-721.

[3] 283 U.S. at p. 716.

[4] 283 U.S. at pp. 710-713.

"The question," Mr. Chief Justice Hughes wrote for the Court in *Near*, "is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed." [1] The answer, of course, was that the prior restraints imposed by the statute were unconstitutional.

In its discussion of the historical background of the rule against previous restraints, the Court quoted *Patterson* v. *Colorado*, 205 U.S. 454, 462, to the effect that "the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practised by other governments' . . .".[2] Mr. Justice Powell, speaking in *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U.S. 376, 390, of the opinion in *Near*, said, "[the Court] has never held that all injunctions are impermissible" (matter in brackets added).

In *Carroll* v. *Princess Anne*, 393 U.S. 175, which Petitioners cite as authority for the statement that the courts refuse to enjoin communication even if it encourages race hatred and may cause rioting,[3] the injunction condemned as a prior restraint had been issued *ex parte*, to county officials. The underlying question of the case, as the Court conceived it, was "whether and by what processes and to what extent the authorities of the local governments may restrict petitioners . . ." (393 U.S. at p. 179). The Court concluded, quoting from the opinion in *Freedman* v. *Maryland*, 380 U.S. 51, 58, "a noncriminal process of prior re-

[1] 283 U.S. at 713.

[2] The Court also quoted the following from Madison's Report on the Virginia Resolutions, "This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive as in Great Britain, but from legislative restraint also." 283 U.S. at p. 714.

[3] Petitioners' brief at page 16.

straints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system'." [1] The preliminary injunction was granted in this case after an adversary hearing under procedural safeguards.

The Court, discussing the validity of the injunction considered in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, (on which Petitioners rely) noted that the injunction "operates not to redress alleged private wrongs, but to suppress on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." (402 U.S. at pp. 418-419).

In *New York Times Co.* v. *United States*, 403 U.S. 713, cited by Petitioners as controlling, the United States government, and the District of Columbia, sought injunctions against publication of a classified government study on the ground that publication "could" or "might" or "may" prejudice the national interest. As Mr. Justice White indicated in the portion of his opinion quoted at pages 21 and 22 of this brief, the situation presented in that case was "quite distinct" from one presented in private litigation to enforce a private right. The Court in a *per curiam* opinion denied injunctive relief on the ground that the government failed to show justification for the restraint. As shall be seen in the following points dealing with the reasons for the complaint against the Petitioners' book, there is ample justification for the minor restriction in this case, of a physician's disclosure of confidential information.

In *Healy* v. *James*, 408 U.S. 169, on which Petitioners also rely, the administration of a college, acting for the

[1] 393 U.S. at p. 181.

state,[1] refused to recognize a chapter of the Students for a Democratic Society as a campus organization. The question presented was not whether an injunction against the distribution of printed matter is a prohibited form of prior restraint, but whether a refusal of recognition, which prevented the organization from using college facilities and from announcing meetings and other activities in the student newspaper, was a denial of freedom of expression. The Court held that nonrecognition could not properly be based upon disagreement with the students' beliefs or associations, or the belief that the group would be a disruptive influence, but that non-recognition could properly be based on the group's refusal to abide by reasonable campus regulations.

Doe v. *McMillan*, 412 U.S. 306, cited by Petitioners, also has no bearing on the issues of this case. It was an action brought against members of Congress, the public printer and the Superintendent of Documents. The suit was instituted by parents of school children to enjoin the publication of a report that was said to be defamatory and an invasion of the privacy of children named in the report. The questions considered by the Court related to the scope of Congressional inquiry and the principle of separation of powers.

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58, on which Petitioners also rely, involved the activities of a commission appointed by a state legislature. The commission suppressed books it thought objectionable, by coercing booksellers to stop selling the books. The Court held that the petitioners-publishers in that case were entitled to injunc-

[1] See concurring opinion of Mr. Justice Rehnquist, 408 U.S. at p. 201, in which he described the Court's opinion as one relating to the constitutional limitations on the government's acting as administrators of a college.

tive relief prohibiting the commission's practices, because the commission effectively suppressed books without affording booksellers and publishers a hearing of any kind to determine whether the suppressed books were constitutionally protected.

Heller v. *New York*, 413 U.S. 483, *Roaden* v. *Kentucky*, 413 U.S. 496, and *Freedman* v. *Maryland*, 380 U.S. 51, all cited by Petitioners, involved seizure of films by government officers before adversary hearings were conducted.

None of the cases relied on by the Petitioners deals with the validity of an injunction or a preliminary injunction granted in a private civil suit after an adversary hearing.

POINT II

The First Amendment guarantee is not infringed by the enforcement of a patient's claim against her psychiatrist, for publishing privileged information in violation of a statute.

The Appellate Division found that the patient presented two cognizable claims for relief in this case, one for breach of the physician-patient relationship (discussed in this point) and the second for violation of the patient's right of privacy (discussed in point III of this brief) (A 104). Petitioners concede that it is "the business of the New York courts and the New York legislature to determine whether that state is to accord" such right of action.[1] But they complain that the courts below failed to take into account "the limitation the Constitution imposes on any such action."[2]

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[1] Petitioners' brief at p. 28.

[2] Petitioners' brief at p. 29.

Petitioners do not, in their brief, define the limitations on the right of action that the Constitution imposes. They suggest that the constitutional boundaries have not been drawn because, they say, the right of action is a new one. "[T]he New York courts . . . appear to have created a new cause of action," Petitioners write, and they urge the Court to "clarify that any such cause of action must comply with First Amendment requirements." [1]

The issues relating to a patient's right of action against his or her physician, for revealing privileged information obtained in the course of treatment, and the possibility that the right may infringe the constitutional guarantee of freedom of expression, are not properly before the Court.[2] We shall discuss the issues in the event the Court wishes to consider them.

The right of a patient to sue a physician for disclosure of confidential information, is of course not a new one, and this Court has previously taken note of it. In *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y.Supp. 481, the Court held that the doctor's public exhibition of a film showing his patient in childbirth was actionable, despite the patient's consent to the showing of the film to medical societies. Mr. Justice Harlan in his concurring and dissenting opinion in *Time, Inc.* v. *Hill*, 385 U.S. 374, wrote that the film in *Feeney* v. *Young was* "so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication." 385 U.S. at 404. (It is difficult to conceive of information more intimate or embarrassing than that told by the patient to the psychiatrist and then retailed in the book, "In Search of A Response".)

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[1] Petitioners' brief at p. 8.

[2] See discussion at pp. 13-15 of this brief.

The duty of a physician to keep a patient's confidences inviolate is a statutory one. When the statutory duty is violated, the patient whose secrets have been divulged is entitled to redress. *Simonsen* v. *Swenson*, 104 Neb. 224, 177 N.W. 831, involved a Nebraska statute that provided for revocation of a physician's license for "betrayal of a professional secret to the detriment of a patient." The Court, speaking of the statute, said (177 N.W. at p. 832):

> "By this statute, it appears to us, a positive duty is imposed upon the physician, both for the benefit and advantage of the patient as well as in the interest of general public policy. The relation of physician and patient is necessarily a highly confidential one. It is often necessary for the patient to give information about himself which would be most embarrassing or harmful to him if given general circulation. This information the physician is bound, not only upon his professional honor and the ethics of his high profession, to keep secret, but by reason of the affirmative mandate of the statute itself. A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong."[1]

See also *Clark* v. *Geraci*, 29 M.2d 791, 208 N.Y.S.2d 564, in which the Court said in holding that a breach of a doctor's obligation of secrecy is actionable: "[D]isclosure is plainly reprehensible as indicated by the statutory law in this State, accepted usage and the Hippocratic Oath, for in-

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[1] The Court dismissed the complaint against the doctor in *Simonsen* because the confidential information revealed was, in the doctor's opinion, required to prevent infection. (Article 23 of the New York Public Health Law also requires the reporting of such information.)

formation possessed by the doctor concerning the illness of his patient has long been thought of as a protected professional confidence upon which every patient may rely"; *Hammonds* v. *Aetna Casualty & Surety Company*, 237 F. Supp. 96 at pp. 101, 102, and 243 F. Supp. 793 at pp. 795, 796; and *Davis* v. *Supreme Lodge, Knights of Honor*, 165 N.Y. 159, 58 N.E. 891.

The New York statutes passed to prevent physicians from divulging confidential communications received from their patients are CPLR 4504(a), enacted in its first version in 1828 (2 Rev. Stat. § 73 [1st ed. 1829]), p. 406, and New York Education Law §§ 6509, 6511, and concomitant regulations.

CPLR § 4504(a) provides:

> "Unless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."[1]

The Education Law and the regulations[2] impose additional sanctions to discourage doctors from revealing information about their patients, by making the disclosure grounds for revocation or suspension of a doctor's right to practice.

CPLR § 4504(a) is a public health measure. It was designed to encourage reliance and dependence on doctors. At the time the law was passed, a client's revelations to his or her lawyer were protected under the common law, but a patient's disclosures to a doctor were not protected.

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[1] Petitioners concede that the Court below found that the statute is violated by the disclosure of confidential information whether the patient's identity is revealed, or not. See Petitioners' brief at pp. 9, 36.

[2] 8 New York Code of Rules and Regulations §60.1.

The New York legislature passed the law in the belief that without some guarantee of secrecy, people might be reluctant to confide in physicians and might withhold information essential for proper treatment and recovery. The legislators' notes state (3 Rev. Stat. [2d ed. 1836], p. 737):

> "The ground on which communications to *counsel* are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger."

The rule against a physician's disclosure of confidential information given in the course of treatment should be applied most stringently when the information is given by a patient to a psychiatrist.[1]

> ". . . [P]sychotherapy by its very nature is worthless unless the patient feels assured from the outset that whatever he may say will be forever kept confidential. Without a promise of secrecy from the therapist, buttressed by a legal privilege, a patient would not be prone to reveal personal data which he fears might evoke social disapproval. Not only is the data essential for the purpose of constructing a reliable case history, but also the catharsis achieved by its verbalization may itself be a significant factor in treatment." Note, *Confidential Communications to a Psychotherapist: A New*

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[1] Six states that do not recognize the physician-patient privilege have laws protecting the confidentiality of a patient's disclosures to a psychiatrist. 7 Fla. Stats. Ann. §90.242; 13 A-Code of Ga. Ann. §38-418(5); 15 Ky. Rev. Stats. §421.215; 4A Annot. Code of Md., Art. 35 §13A; 8 Part 3 Ann. Laws of Mass. Chap. 233 §20B; 4 New Mex. Stats. 1953 §20-4-504.

Testimonial Privilege, 47 Northwestern U. L. Rev. 384, 386, 387.[1]

The psychiatrist in this case suggests[2] that as Freud published accounts of his cases, she should also be free to do so. Although a response to that argument seems unnecessary, it should be noted that Freud wrote, "It would be a grave breach of confidence to publish material . . . with the risk of the patients being recognized and their acquaintances becoming informed of facts which were confided only to the physician. It has therefore been impossible for us to make use of some of the most instructive and convincing of our observations."[3]

The Petitioners do not claim that the State lacks authority to legislate with respect to public health, or to prescribe standards for the practice of medicine in the state. See *Barsky* v. *Board of Regents,* 347 U.S. 442, 449; *Williamson* v. *Lee Optical Company,* 348 U.S. 483; *Lambert* v. *Yellowley,* 272 U.S. 581, 597. And Petitioners do not contend that the statutes on which the patient's cause is based are not in the public interest, or that they are not expedient, or that they are over-broad or vague.

The strength of the public policy underlying the prohibition of doctors' disclosure of confidential information re-

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[1] The *amici,* American Psychiatric Association, American Psychoanalytic Association and American Orthopsychiatric Association, in their proposed brief in support of the patient's position, explain the importance in psychotherapy of enabling "patients to expose the dark recesses of their minds" with assurance that whatever is said will not become public property.

[2] Petitioners' brief at pp. 29, 30.

[3] J. Breuer and S. Freud, *Studies on Hysteria,* vol. 2 (standard ed., Hogarth, 1955), p. 29. See M. H. Hollender, *Privileged Communication and Confidentiality,* Diseases of the Nervous System, vol 26, No. 3 (1965), p. 173; J. B. Robitscher, *Pursuit of Agreement: Psychiatry & The Law* (Lippincott, 1966), pp. 232-233.

ceived from patients, is evidenced by the existence of laws similar to one or both of the New York statutes, in forty-two other states.[1]

A law prohibiting doctors from broadcasting their patient's secrets does, it is true, interfere with the right of doctors to speak about their patients with complete freedom. But the limited restriction does not infringe the constitutional guarantee of free speech and press. Every restriction of speech does not create a constitutional problem. The Constitution doesn't guarantee the right to speak with complete freedom at all times and under all circumstances. *United Public Workers* v. *Mitchell*, 330 U.S. 75; *Colten* v. *Kentucky*, 407 U.S. 104, 111.

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[1] Alaska, Rules of Civil Procedure—Rule 43 (h4), Rules of Criminal Procedure—Rule 26(a, b); 4 Ariz. Rev. Stats. Ann. §12-2235, 5 Ariz. Rev. Stats. Ann. §13-1802(4); 3A Ark. Stats. Ann. §28-607; 29B Cal. (Ev) Code, Div. 8, Ch. 4, Art. 6, §§990-995, Art. 7 §§1010-1015; 7 Colo. Rev. Stats. §154-1-7(5); D.C.C.E. §14-307; 7 Hawaii Rev. Stats. §621-20.5; 2 Idaho Code §9-203(4); 51 Smith-Hurd Ill. Ann. Stats. §§5.1, 5.2; Burns Ind. Stats. Ann. —Code Ed. §34-1-14-5; Vol. 43 Iowa Code Ann. §622.10; 4 Kansas Stat. Ann. §60-427; 7 Louis. Rev. Stats. Ann. §13-3734; 9 Maine Rev. Stats. Ann. (1973 Supp.) Title 32 §3295, 9 Maine Rev. Stats. Ann. Title 16 §60; 33 Mich. MCLA §600-2157; 38 Minn. Stats. Ann. §595.02(4); 4 Miss. Code 1972 Ann. §13-1-21; 28 Vernon's Ann. Mo. Stats. Title 33, Ch. 491, §491.060; 7 Rev. Codes of Mont. Ch. 701 §93-701-4(4); 2 Rev. Stats. of Neb. (1964 reissue) §25-1206; 3 Nev. Rev. Stats. §49.215-235; 3 N.H. Rev. Stats. Ann. §329:26; Title 2A N.J. Stats. (Rev. 1951) 2A:84A-22.1 &22.2; 1B Gen. Stats. of N.C. §8-53; 6 N. Dak. Century Code Ann. §31-01-06; Title 23 Page's Ohio Rev. Code §2317.02; 12 Okla. Stats. Ann. §385; 1 Ore. Rev. Stats. §44.040; 28 Purden's Pa. Stats. Ann. §328; 7 S. Dak. Compiled Laws (1967) §19-2-3; 9 Utah Code Ann. §78-24-8(4); Title 12 Vt. Stats. Ann. §1612; 14 W. Va. Code §50-6-10; 2 Code of Va. Title 8 §8-289.1; Title 5 Wash. Rev. Code Ann. §5.60.060(4); 2 Wyo. Stats. 1957 Title 1 §1-139; 7 Fla. Stats. Ann. §90.242; 13 A-Code of Ga. Ann. §38-418(5); 15 Ky. Rev. Stats. §421.215; 4A Annot. Code of Md. Art. 35 §13A; 8 Part 3, Ann. Laws of Mass. Chap. 233 §20B; 4 New Mex. Stats. 1953 §20-4-504.

Criminal sanctions against extortion by threat to expose a secret or an incident that would subject the person threatened to contempt or ridicule,[1] may also be said to inhibit complete freedom of expression, but the restriction does not present any difficult constitutional problem. A doctor who subjects a patient to ridicule and contempt by publishing the intimate details of the patient's life also violates the law. If affording a civil remedy against such conduct is held to violate the Constitution, the laws prohibiting such disclosures by physicians will be ineffectual.

The First Amendment is not violated simply because conduct, properly proscribed in the public interest, is brigaded with expression. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language either spoken, written or printed." *Cox* v. *Louisiana*, 379 U.S. 536, 555. The State is not powerless to deal with a wrong because in doing so it must prevent communication. "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' (see *NAACP* v. *Button*, 371 US 415, 444) which the legislature has the power to control." *California Transport* v. *Trucking Unlimited*, 404 U.S. 508, 515.

In *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, peaceful picketing was enjoined because its purpose and effect was to violate a law punishing unlawful restraint of trade. Mr. Justice Black wrote for the Court:

> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." (336 U.S. at p. 498)

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[1] New York Penal Law §155.05 subd. 2(e)(v).

> "In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. . . . But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. Virginia Electric Co. v. Board, 319 US 533, 539, Thomas v. Collins, 323 US 516, 536-540." (336 U.S. at pp. 501, 502)

See also concurring opinion of Justices Black and Douglas in *Gregory* v. *Chicago*, 394 U.S. 111, 125. The doctrine of the *Giboney* case, although it involved a penal statute, is applicable with equal force to conduct made unlawful by civil statute. See cases cited at pages 19-21 of this brief.

The public policy underlying the law involved in this case is an important one of long standing. One of the statutes violated by the Petitioners has been in effect 146 years, and similar laws have been enacted throughout most of the country.[1] Denying an appropriate remedy to a patient whose confidences are published by a psychiatrist, in a "case history" or in a commercial book, would defeat the primary purpose of the forty-three state statutes enacted to preserve the confidentiality of patients' communications to physicians and psychiatrists.

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[1] See footnote at p. 39 of this brief.

Cf. *Giboney* v. *Empire Storage Co.*, 336 U.S. at p. 502, "The Missouri policy against restraints of trade is of long standing and is in most respects the same as that which the Federal Government has followed for more than half a century."

POINT III

There is no merit to petitioners' argument that an action for invasion of privacy brought by a private individual whose personal life is publicized in a "case history", can be sustained only if there is proof that the failure to conceal the complainant's identity was due to wilful disregard of "professional standards." [1]

Because of the professional relationship between them, the patient told the psychiatrist of painful experiences and memories she did not want anyone else to know. The psychiatrist's betrayal of the patient's trust, by publishing what was said to her in confidence, gave rise to the right of action discussed in Point II of this brief. But the publication of the material is itself actionable as an invasion of the patient's privacy, a right of action that is not dependent on the relationship of the parties.

The right of privacy is recognized and protected as a constitutional right because personal liberty is in part dependent on it. If we knew that whatever we said or did would be publicly reported, fear of disapproval, ridicule, reprisal or even fear of disagreement, might deter us from speaking freely, or from living our lives as we want to live them. Fried, *Privacy*, 77 Yale L.J. 475, 483; *Talley* v. *California*, 362 U.S. 60; *Bates* v. *Little Rock*, 361 U.S. 516; *NAACP* v. *Alabama*, 357 U.S. 449.

Mr. Justice Brandeis wrote in his noted dissent in *Olmstead* v. *United States*, 277 U.S. 438, 478: "The makers of

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[1] The issues discussed in this point are also not properly before the Court but are included in the event the Court wishes to consider them. See discussion at pages 13-15 of this brief.

our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone,—the most comprehensive of rights and the right most valued by civilized men." Mr. Justice Brandeis' dissent is now the prevailing view (*Stanley* v. *Georgia*, 394 U.S. 557) and the right of which he spoke, to be let alone by the government, is also protected against encroachment by individuals. *Galella* v. *Onassis*, 353 F. Supp. 196, 232, modified on other grounds, 487 F.2d 986.

There can be little doubt that the publishing of a private person's thoughts, recollections, ideas and emotions is an actionable interference with his or her right to be left alone.[1] "In Search of A Response" is a detailed report of the patient's sexual attitudes, attitudes toward people, opinions, and of her most intimate experiences. It also reports statements allegedly made by the patient's husband that were certain to have mortified the patient, in particular the husband's stated wish to murder the patient, his homosexual experience and his involvement with prostitutes.[2]

The Court below, in acknowledging that the patient set forth a valid cause for invasion of privacy (A 104-105), referred to authorities in which the common-law right of privacy (*Nader* v. *General Motors Corp.*, 25 N.Y.2d 560), and the constitutional right of privacy (*Griswold* v. *Con-*

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[1] As Mr. Justice Brandeis wrote in his dissent in *Olmstead* v. *United States*, just quoted, "They [the makers of the Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." 277 U.S. 438, 478 (matter in brackets added).

[2] "In Search of A Response," Henry, pp. 34-38.

necticut, 381 U.S. 479, and *Roe* v. *Wade,* 410 U.S. 113) were sustained. The state Court's recognition of the patient's common-law right of action does not, as Petitioners acknowledge,[1] create a federal question this Court may consider.

The compass of the constitutional right of privacy has not yet been defined. The range is being explored as new cases involving the right arise. Mr. Justice Blackmun wrote for the Court in *Roe* v. *Wade,* 410 U.S. at 152: "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia,* 394 U.S. 557, 564; in the Fourth and Fifth Amendments, *Terry* v. *Ohio,* 293 U.S. 1, 8-9, *Katz* v. *United States,* 389 U.S. 347, 350, *Boyd* v. *United States,* 116 U.S. 616, see *Olmstead* v. *United States,* 277 U.S. 438, 478 (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut,* 381 U.S. 479, 484-485, in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska,* 262 U.S. 390, 399." See also *Griswold* v. *Connecticut,* 381 U.S. 479; *Stanley* v. *Georgia,* 394 U.S. 557; *Doe* v. *Bolton,* 410 U.S. 179;[2] *Cleveland Board of Education* v. *LaFleur,* —— U.S. ——, 39 L.Ed.2d 52.

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[1] At p. 28 of their brief.

[2] In *Roe* v. *Ingraham,* 480 F.2d 102, 108 fn. 8, the Court of Appeals for the Second Circuit said that language in the opinion in *Doe* v. *Bolton,* 410 U.S. 179, 194, could be read as "extending constitutional protection to the privacy of the doctor-patient relationship."

Mr. Justice Douglas, concurring in *Roe* v. *Wade*, listed "the autonomous control over the development and expression of one's intellect, interests, tastes and personality" as the first of the zones of privacy protected by the Constitution (410 U.S. at p. 211). To assure autonomous control a private person must, at the least, have the right to prevent the publicizing of personal information that would expose him or her to obloquy. See Fried, *Privacy*, 77 Yale L. J. 475, 483; Bloustein, *Privacy As An Aspect Of Human Dignity: An Answer To Dean Prosser*, 39 N.Y.U. L.Rev. 962, 971, 1003.

The constitutional right of privacy was held to have been violated by the publicizing of unsavory incidents of the complainant's past life, in *Melvin* v. *Reid*, 112 Cal. App. 285, 297 Pac. 91, 93; by the distribution of improperly obtained nude photographs of the complainant, in *York* v. *Story*, 324 F.2d 450, 454-456; by taking photographs of a public personality in an obtrusive manner, in *Galella* v. *Onassis*, 487 F.2d 986; by the use, in proceedings to remove a teacher, of derogatory information obtained from her physician, in *Drake* v. *Covington County Board of Education*, 371 F. Supp. 974.

The right of a patient to have his or her statements to a psychiatrist kept in confidence was held a right of privacy protected by the Constitution in *In re: Lifschutz*, 85 Cal.Rep. 829, 467 P.2d 557.[1] The Court said in that case:

> "We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than

[1] The case involved the power of the Court to compel the production of a psychotherapist's records relating to the treatment of a patient. The Court held the psychiatrist could not ordinarily divulge such information, but was in that case required to produce the records because the patient waived the privilege by putting his mental condition in issue.

> the California statute and draws sustenance from our constitutional heritage. In *Griswold* v. *Connecticut*, supra, . . . the United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone (Cf. *People* v. *Belous*, 458 P.2d 194). . . ." (467 P.2d at 567-568).

Petitioners maintain that "In Search of A Response" is a medical case history,[1] and that the psychiatrist in preparing the book, met "the usual professional standards for disguising the patient's identity." Petitioners also contend that their alleged attempt to disguise the patient's identity in accordance with professional standards, is a complete defense to an action for invasion of privacy brought because of the publication of personal material in a medical case history. Petitioners argue that to prevail in such an action, one must prove that there was a "wilful or reckless disregard of such standards."[2] If, despite the attempt to disguise, a complainant is identifiable as the subject of a case history, the Petitioners maintain, he or she is without remedy. "[T]o permit recovery upon mere negligence," Petitioners write, ". . . or even innocent failure to disguise sufficiently is totally improper and should not be countenanced by this Court."[3]

Petitioners' novel defense is based on the assumptions that (1) "In Search of A Response" is a medical "case-history", and (2) that the psychiatrist met the usual professional standards in disguising the identity of the patient and her husband. As shown earlier, at pages 10 and 11 of

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[1] The term is not defined.

[2] Petitioners' brief at p. 35.

[3] Petitioners' brief at pp. 8, 9, 30, 33-35.

this brief, the Court below considered the book a "commercial book" and not a scientific work. It also appears that the "usual professional standards for disguising a patient's identity" were not met by the psychiatrist. (See discussion at page 3 of this brief.)

We shall, for the sake of argument, assume that there is a factual basis for Petitioners' theory; there is not any legal authority to support it. It rests on the Petitioners' own application of the doctrine of *Time, Inc.* v. *Hill*, 385 U.S. 374,[1] to the circumstances of this case. Petitioners' reliance on *Time, Inc.* v. *Hill* is misplaced. Mr. Justice Brennan, speaking for the Court, specifically excluded the application of the rule of *Time, Inc.* v. *Hill* to privacy actions, such as this one, brought for revelations "so intimate and so unwarranted in view of the victim's position, as to outrage the community's notions of decency." (385 U.S. at p. 383, fn. 7).[2]

Time, Inc. v. *Hill*, 385 U.S. 374, was "not 'privacy litigation' in its truest sense".[3] It involved a public "newsworthy" figure, who was "substantially without privacy" (385 U.S. at pp. 383, 386). Mr. Justice Brennan, writing for the Court, stated that a "different test [other than the one applied by the Court in the 'discrete context' of the case] might be required in . . . a statutory action by a private individual," 385 U.S. at p. 391 (matter in brackets added).

Time, Inc. v. *Hill* involved an article in Life Magazine in part about Mr. Hill and his family. The Hill family had been held prisoner by three escaped convicts in 1952.

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[1] Discussed at pp. 29, 31, 32, 33, 34 and 35 of the Petitioners' brief.

[2] Judge O'Brien held in *Davis* v. *Supreme Lodge, Knights of Honor*, 165 N.Y. 159, 58 N.E. 891, that a physician's disclosures of a patient's secrets itself "shocks our sense of decency."

[3] Mr. Justice Harlan, concurring in part and dissenting in part, 385 U.S. at p. 404.

The event was the subject of many front page news stories. A few years later, Life published an article about a play involving a family held hostage by escaped convicts. The Life article gave the false impression that the play mirrored the Hills' experience. The article was not in any way defamatory. Hill sued the publisher of Life for damages, claiming that his statutory right to privacy was violated. The New York privacy statute (New York Civil Rights Law §§50, 51) prohibits the use (without permission) of one's name or photograph in advertisements or for purposes of trade. Hill had not consented to the article and claimed that it was published to advertise the play and increase the circulation of the magazine, and therefore was published for "the purposes of trade" within the meaning of the statute.

An action for violation of the New York privacy statute cannot be maintained when a newsworthy person's name or photograph is used in a factual news report. However, there is authority to the effect that if a news report is substantially false or is "fictionalized," it is not in fact a "news" report and may therefore be within the purview of the privacy statute. The question before the Court in *Time, Inc.* v. *Hill* was whether the New York privacy statute, as construed, impaired First Amendment rights.

As Hill's cause was for the publication of a false report about a public personality, the Court, in deciding that case, applied the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, which involved allegedly false and defamatory reports about public officials. The Court held in *New York Times Co.* v. *Sullivan*, and it also held in *Time, Inc.* v. *Hill*, that "if the freedoms of expression are to have the 'breathing space' they 'need . . . to survive' . . ."[1] a false report

[1] *Time, Inc.* v. *Hill*, 385 U.S. at 388, quoting the opinion in *New York Times Co.* v. *Sullivan*, 376 U.S. at 271-272.

about a public person relating to matters of public interest is not actionable unless the falsity is calculated, that is, unless the report is made with knowledge of the falsity or with reckless disregard of the truth. *Time, Inc.* v. *Hill*, 385 U.S. at 389-391.

Petitioners submit that the applicability of the decision in *Time, Inc.* v. *Hill* to this case, "appears well-nigh indisputable."[1] Arguing that as the defendants in *Time, Inc.* v. *Hill* could not have been held liable for negligent failure to determine the truth or falsity of the article involved in that case, the psychiatrist maintains that she should not, in this case, be held liable for negligent failure to disguise the patient's identity in her (the psychiatrist's) book.[2] The leap from the special issue of the falsity of the news article in *Time, Inc.* v. *Hill* to the issue of the patient's identity in this case, is not explained.

The Court in *Time, Inc.* v. *Hill* said, and repeated, that its determination of that case was limited to the special circumstances of the case (385 U.S. at pp. 391, 397). Obviously the circumstances of *Time, Inc.* v. *Hill* are quite different from the factual situation in the instant case, and the two actions are for the enforcement of very different rights. The article involved in *Time, Inc.* v. *Hill* was not offensive, and it was actionable only because of the fictionalization of the events described. It is not necessary to set forth all the reasons that the doctrine of *Time, Inc.* v. *Hill* is not applicable to the instant case, for even if we were to assume that the general principles of *Time, Inc.* v. *Hill* would otherwise govern this case, the fact that the patient-plaintiff in this case is a private person, and not a newsworthy person, dictates a determination contrary to that reached in *Time, Inc.* v. *Hill*.

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[1] Petitioners' brief at p. 33.

[2] Petitioners' brief at pp. 32-35.

On June 25, 1974, this Court held in *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 42 U.S.L.W. 5123, that the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, is not applicable to an action for libel brought by a private person for publication of a defamatory article about him, though the subject of the article is a matter of general interest. The Court concluded that in an action for defamation brought by a private person, it is not necessary for the plaintiff to show that the false report was made with knowledge of its falsity, or with reckless disregard of the truth.

Mr. Justice Powell, explaining the difference between the rule governing a libel action brought by a public figure, and one brought by a private person, said in *Gertz*, —— U.S. ——, 42 U.S.L.W. at pp. 5129, 5130, "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater. . . . [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office nor assumed an 'influential role in ordering society.' *Curtis Publishing Co.* v. *Butts*, *supra*, 388 U.S., at 164 (opinion of Warren, *C. J.*). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."

The Court indicated in *Time, Inc.* v. *Hill*, 385 U.S. at p. 391, that had the action been brought by a private individual, a different rule might have been applied. Such an action, brought by a private person, would require application of the rule of the *Gertz* case, as the action in *Time, Inc.* v. *Hill*, brought by a public figure, required application of the doctrine of *New York Times Co.* v. *Sullivan*. It is clear that if the rule of *Time, Inc.* v. *Hill* were applicable to a case such as the one at bar, it would be applicable only if the subject of the case history were a public figure. Applying the principles of the *Gertz* case to this action brought by a private person, even "innocent failure to disguise sufficiently" is actionable.

A Discussion of Other Authorities Relied on By the Petitioners.

Petitioners refer to a law review article, Haiman, *Speech* v. *Privacy: Is There A Right Not To Be Spoken To?* 67 Northwestern U. L.Rev. 153, and a number of cases,[1] as authority for the statement "that even in the case of a clash between a privacy claim and a First Amendment claim, the primal magnitude of the First Amendment must prevail." The quotation from the article, in Petitioners' brief, is misleading. Material that Petitioners deleted from the portion of the article they quoted, reveals that the article does not apply to the right of privacy involved in this case.

In his law review article, Professor Haiman distinguished between the right not to be spoken about (the right involved in this case) and the right not to be spoken to (for example, the right to be protected from unwanted mail or from announcements made through loudspeakers on public streets). The portion of Professor Haiman's article set

[1] At p. 22 fn. 14 of the Petitioners' brief.

out in Petitioners' brief was edited so that it appears that the excerpt quoted relates to the right of privacy with which we are here concerned. The following is the quotation from the article in Petitioners' brief, with the deleted portion inserted and italicized.

> "[I]n the clash of free speech and privacy interests *surrounding claims of a right not to be spoken to,* we must be careful not to allow our natural sympathy for tender psyches to beguile us into accepting serious erosion of the First Amendment. The human psyche . . . is tougher than most of its would be protectors are inclined to admit. It is generally quite capable of taking care of itself." Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?* 67 Northwestern U. L. Rev. 153, 199.

Portions of Professor Haiman's article relating to the right not to be talked about, indicate an attitude different from that expressed in the quoted language. See 67 Northwestern U. L. Rev. pp. 153 to 157.

Public Utilities Comm'n v. *Pollak,* 343 U.S. 451, cited as authority for the rule that the constitutional right of expression takes precedence over the right of privacy, also involved a claim of right to be protected from unwanted communication. The plaintiff objected to broadcast music in public buses. The Court held that although there is a right to be free of amplified announcements that can be heard in one's home (*Kovacs* v. *Cooper,* 336 U.S. 77), one doesn't have that right of privacy when travelling on a public bus.

Albany Welfare Rights Organization v. *Wyman,* 493 F.2d 1319 (cited at page 22 of Petitioners' brief), involved a claim of the Welfare Bureau that the distribution of literature in the Bureau's waiting room interfered with

the right of welfare recipients to privacy. The Court held (493 F.2d at 1324):

> "We do not consider the right of privacy of the welfare recipients [in the public waiting room] as a compelling consideration against First Amendment rights. . . . This is not intrusion into the home, the church or the voting booth."

Lamont v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, *aff'd* 386 F.2d 449, *cert. den.*, 391 U.S. 915 (cited at page 22 of Petitioners' brief), does not relate to public disclosure of personal matters. In *Lamont*, the plaintiff attempted to prevent the Motor Vehicle Bureau from selling the names and addresses in its files to a mail order business. The information being sold from the registration records was available to the public. The Court found that the plaintiff did not state a cause for invasion of privacy.

In *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415[1] (cited as holding that First Amendment rights take precedence over the right of privacy), the Court held (402 U.S. at 418) that private rights were not in issue.

Petitioners refer, in a part of their brief quoted before,[2] to "the holdings of this Court that even in the case of a clash between a privacy claim and a First Amendment claim the primal magnitude of the First Amendment must prevail." That is not our reading of the Court's opinions. The precept distilled from the opinions of the Court is that when the constitutional rights of communication and privacy are in conflict, the Court in determining which right shall prevail, considers the purpose and the impact of

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[1] Also discussed at p. 31 of this brief.

[2] Petitioners' brief at p. 22 fn. 14.

the limitation on the right of speech, and the depth of the threatened intrusion into private lives. Thus in *Breard* v. *Alexandria*, 341 U.S. 622, a law prohibiting door-to-door solicitation of magazines and other canvassing was held constitutional against attack on the ground that it infringed freedom of expression. The Court said, "This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place. . . ." (341 U.S. at 626-627). "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." (341 U.S. at 642).

And in *Rowan* v. *Post Office Dept.*, 397 U.S. 728, the Court said, in sustaining a limitation on the right of communication by mail:

> "Without doubt the public postal system is an indispensable adjunct of every civilized society and communication is imperative to a healthy social order. But the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." (397 U.S. at 736). If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." (397 U.S. at 738).

In the instant case, the limitation on the physician's right of communication is a minor one. One can transmit information about a mental condition and the treatment of it, without publishing a transcript of psycho-therapeutic sessions between a psychiatrist and patient. The professional associations of psychiatrists believe that compliance with

existing statutes that prevent disclosure of a patient's confidences will not hamper, and have not hampered, the dissemination of medical learning. The public interest demands the limitation, not the protection, of the right of physicians to divulge their patients' confidences. The achievement of the public objective, and the prevention of the massive invasion upon the patient's constitutional right to privacy, and the intrusion upon the lives of others if the Petitioners' position had been sustained, required issuance of the order under review.

There should also be weighed in the balance, the loss, if the Petitioners should prevail, of public confidence in psychiatrists and psychiatry. That, of course, is the reason the psychiatrists' associations oppose the psychiatrist's position in this case.

CONCLUSION

For the reasons outlined the order of the New York Court of Appeals in this case should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTION OF THE STATE OF NEW YORK

Article 6, Section 3 [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

NEW YORK CIVIL PRACTICE LAW AND RULES

§ 2218. Trial of issue raised on motion.

The court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee. If the issue is triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issue. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury. An order under this rule shall specify the issue to be tried.

§ 4504. Physician, dentist and nurse.

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. . . .

§ 5501. Scope of review.

(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal.

§ 5612. Presumptions as to determinations of questions of fact.

(b) Appeal on certified questions of law. On an appeal on certified questions of law, the court of appeals shall presume that questions of fact as to which no findings are made in the order granting permission to appeal or in the order appealed from or in the opinion of the appellate division were determined in favor of the party who is respondent in the court of appeals.

§ 6301. Grounds for preliminary injunction and temporary restraining order.

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

§ 6311. Preliminary injunction.

1. A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment. A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

R. 6312. Motion papers; undertaking.

(a) Affidavit; other papers. On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

(b) Undertaking. Except as provided in section 2512, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, . . .

NEW YORK STATE CIVIL RIGHTS LAW

§ 50. Right of privacy.

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages.

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. . . .

NEW YORK STATE EDUCATION LAW

Subarticle 3. Professional Misconduct

§ 6509. Definitions of professional misconduct.

Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

(9) Committing unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents.

§ 6511. Penalties for professional misconduct.

The penalties which may be imposed by the board of regents on a present or former licensee found guilty of professional misconduct (under the definitions and proceedings prescribed in sections sixty-five hundred nine and sixty-five hundred ten of this article) are: (1) censure and reprimand, (2) suspension of license, (3) revocation of license, (4) annulment of license or registration, and (5) limitation on registration or issuance of any further license. The board of regents may stay such penalties and place the licensee on probation and may restore a license which has been revoked.

NEW YORK CODE OF RULES AND REGULATIONS

Section 60.1

(d) *Unprofessional conduct in the practice of medicine* shall include but not be limited to the following:

(3) the revealing of facts, data or information obtained in a professional capacity relating to a patient or his records without first obtaining consent of the patient or his duly authorized representative, except if duly required by a court of competent jurisdiction or statute. Nothing in this Part shall prohibit a physician from making such facts, data or information available to a department of State government, providing that such department shall when requesting such facts, data or information notify the physician in writing that such facts, data or information shall be used only for research and study and that their con-

fidential nature shall be maintained; nor shall the revealing of such facts, data or information by a physician or a hospital to attorneys to aid in defense of a suit or claim against them by a former patient constitute unprofessional conduct . . . .

NEW YORK STATE PENAL LAW

Section 155.05

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

(v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule . . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE, and COE PRESS, INC.,

Petitioners,

—v.—

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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ARGUMENT

POINT I

The record in this case is constitutionally insufficient to support the decision below.

Respondent's brief in this Court attempts to distort the record in this case, perhaps in an effort to divert attention from the glaring constitutional outrage committed by the courts below. The central and undeniable fact presented by this record is that for nearly two years, the New York courts have enjoined the circulation of a book, concededly truthful, scientific, and non-obscene, and presumptively protected by the First Amendment, although not a single one

of those courts has found that *any* individual or societal interest is harmed by the book. The plain reason for this attempted distortion,[1] of course, is that should this Court reach a decision upon the actual record in this case, respondent recognizes that the preliminary injunction cannot possibly be sustained.

The brief *amici curiae* of the American Psychiatric Association, *et al.* (hereinafter "*amici* APA"), although it

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[1] There is *no* support in the record, either in references provided in respondent's brief, or anywhere else, for the following statements:

(a) On pp. 4-5, that, in accordance with respondent's fanciful presumption theory, see *infra*, the factual issue in dispute which must be "assumed" in respondent's favor, is that "a reader of the book who knew about the patient, would have known that the book related to her and her former husband." In fact, the issue as drawn by Special Term (A84), and affirmed by the Appellate Division (A104) was whether the plaintiff could be identified by someone who not only knew the plaintiff but who also knew that plaintiff was the patient of the doctor.

(b) On p. 5, that petitioners claim that Special Term resolved the factual question of *consent* in their favor. In fact, petitioners' brief (p. 5) makes it clear that the factual question decided "largely" in their favor is the question of identifiability.

(c) On p. 5, that both sides agree "that the psychiatrist requested, and the patient refused, to give written consent."

(d) On pp. 26-27, that there is nothing in the record to support the contention that petitioners sought to expedite the proceedings in the state courts. See petitioners' brief, p. 6, n. 4. What respondent objects to is that petitioners insisted on attacking the injunction, in every forum available, and on the most expedited basis available, rather than accommodate respondent's strategy of forcing petitioners to trial with an injunction in force, and without adequate discovery.

(e) On p. 36, that CPLR §4504(a), New York's medical testimonial privilege statute, imposes "sanctions" on physicians, and on p. 41, that petitioners "violated" this statute.

(f) On p. 47, that the Appellate Division "considered the book . . . not a scientific work."

does not indulge in record distortions, is premised almost entirely on a single but fundamental misreading of the proceedings below. See Point I B, *infra*.

A. *There is no "presumption" of New York law which can decontaminate the constitutional errors committed below.*

Thus, respondent's entire argument is based upon a purported "presumption" of the New York Civil Practice Law and Rules, that because the intermediate state appellate court made no explicit factual findings in its order granting leave to appeal to the highest state court, "it must be assumed that all factual disputes were resolved in favor of the [respondent]" (Brief, pp. 3-4). Respondent is clearly and demonstrably wrong in urging that this arcane[2] provision was applied by the Court of Appeals, or that this was a proper case for that court to do so. This Court need not even consider this question of New York law, however, for even if respondent is conceivably correct—which we deny—her argument is not aided, since such a *sub silentio* application of the statute would still leave this Court with no indication whatever on the record of the basis for the actions of the courts below. Either the presumption was not applied, and the Court of Appeals sustained the injunction on the ground of a totally inadequate factual record, in

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[2] The Court of Appeals of the State of New York has decided not a single case under this provision since the adoption of the CPLR in 1963. Nor is the Practice Commentary cited in respondent's brief (p. 4, n. 1) of any assistance. Indeed, respondent's brief fails to advise the Court, and without any explanation, or even any indication of omission, that the second quotation, ostensibly taken from the Practice Commentary written on the 1963 statute, is in fact, taken from (and cited to) Cohen & Karger, POWERS OF THE NEW YORK COURT OF APPEALS, published in 1952, commenting on an earlier and different statute.

which the only clear finding is that of Special Term that respondent was not identifiable (A83-84); or it was applied, and the injunction was sustained upon a ground of state law nowhere articulated, or even raised, in the state courts. In either case, this Court is presented with a record upon which it is totally impossible to determine the ground upon which the courts below purported to override the "heavy burden" of presumptive unconstitutionality of prior restraints, and the injunction must be vacated.

Moreover, that no such presumption in fact underlay the decision of the court below appears obvious. First, as respondent's own brief makes clear, the presumption is invoked only where neither the orders of the Appellate Division, nor its opinion, sets forth its disposition of the facts, but that court's order granting leave to appeal (A124-125) states directly that its modification of the *nisi prius* court's order was based solely on a decision of law. Further, the intermediate court's opinion makes equally clear that the trial court's factual findings were affirmed; the opinion specifically states that, except for the broadening of the injunction to enjoin *all* distribution of the book, the "order is affirmed" (A103). The only ground of disagreement with the lower court set forth by the Appellate Division, is its legal conclusion, urged by *both* parties, that it could "find no justification for the distinction attempted to be drawn between 'scientific readers' and the general public" (A104). Thus the findings of fact by the lower court—including its finding that the respondent almost certainly could not be identified by readers of the book—were specifically affirmed,[3] the requirements of CPLR

[3] The contrary assertion by *amici* APA, *et al.*, that Special Term was reversed on the facts, is without merit. See pp. 7-9, *infra*.

5612(b) were satisfied, and no contrary presumption was invoked by the Court of Appeals. Indeed, this conclusion is buttressed by the action of the Court of Appeals itself, in deciding the case at all. The most widely respected treatise upon New York Civil Procedure[4] observes that "The consequence of invoking the presumption is ordinarily dismissal of the appeal." 7 Weinstein, Korn & Miller, NEW YORK CIVIL PRACTICE, §5612.07, at pp. 56-87 to 56-88 (1973).[5]

But the Court of Appeals did not dismiss the appeal, nor did it direct resettlement to clarify any confusion. Rather it decided the case on the merits, although regrettably without opinion. And in neither its original decision (A127) nor its amended decision (A128) is there even a hint that the decision is based on this "presumption" which respondent's counsel now raises for the first time. See 7 Weinstein, Korn & Miller, NEW YORK CIVIL PRACTICE, §5612.05, at pp. 56-85 to 56-86: "[A] presumption must, after all, accord with common sense." So, of course, must its application. Plainly, respondent's contention that this Court must decide the case as if all factual contentions had been decided in her favor, is erroneous, and all of respondent's subsequent arguments (Brief, p. 6, p. 13, p. 14, p. 42), which are based on this erroneous contention, must fail.

Even if respondent is conceivably correct, however, that this case was a proper one for the invocation by the court

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[4] Written by three of the authors of the CPLR.

[5] The sole case offered by respondent in support of her arguments is totally irrelevant. *Chaplin* v. *Selznick*, 293 N.Y. 529, 58 N.E.2d 719 (1944), decided under the predecessor Civil Practice Act, holds only that where "neither Special Term nor the Appellate Division made express findings of fact," the Court of Appeals would assume all facts in favor of the appellee. Even respondent does not claim that Special Term made no findings (see A82-85).

below of the presumption in her favor, her argument still must fail. First, it is noteworthy that the contention, supposedly dispositive, was not raised in the one proper forum for its invocation, and the one proper forum to authoritatively determine its applicability: the state court charged with applying it in a proper case. Neither respondent's brief in the Court of Appeals, nor her oral argument there, nor even her opposition to petitioners' motion to amend that Court's remittitur,[6] contained so much as a word with regard to this supposedly dispositive argument; indeed, not even her Brief in Opposition to Certiorari in this Court raises the issue. Clearly, respondent cannot now be heard to raise an argument of state law which has been waived in the state courts. See *Milliken* v. *Meyer,* 311 U.S. 457, 461 at n. 8 (1940). Moreover, even if respondent is correct, that the Court of Appeals should have, and did, invoke the presumption, its decision—which affirmed a prior restraint—cannot stand, where it did not articulate this reason for that decision. See petitioners' opening brief, pp. 9-21. If this Court entertains even a suspicion that respondent is correct as to the rationale of the decision below, the injunction should be vacated, and the case remanded to the courts of the State of New York for a determination as to whether this case is a proper one for the invocation of the presumption, and whether, if so, the presumption is dispositive in view of those courts' interpretation of the constitutional issues here presented.

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[6] The crux of respondent's argument in opposition to amending the remittitur was her counsel's view that "the constitutional question raised is not substantial". Affidavit of Ephraim S. London, Esqs., Feb. 14, 1974, p. 3.

B. *The Appellate Division did not reverse Special Term.*

Still more insupportable is the contention of *amici* APA, *et al.*, that the "only reasonable reading" of the Appellate Division's opinion is that the latter court "reviewed the record, and reversed the trial court's ruling on identifiability" (pp. 28-29).[7] This contention is predicated on the sentence:

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[7] *Amici's* assertion that the state courts all resolved the issue of consent in respondent's favor (Brief, p. 28) is equally unwarranted, but matters little. Respondent's consent or lack thereof has no bearing on this action, until it becomes clear that she can be identified. Unless it is shown that there is potential harm to the respondent, the State may not, with or without "consent" by her, tamper with the petitioners' constitutional right to publish. Moreover, even *amici's* assertion (*id.* at n. 26) that the consent claimed by petitioners was obtained during therapy, and is therefore suspect, is undercut by the authorities cited elsewhere in their brief (pp. 40-41, at n. 45). The examples of "consents" which they there set forth (Laing & Estherson, SANITY, MADNESS AND THE FAMILY (1964); Laing, THE DIVIDED SELF (1965)), give no clue as to whether such consent was obtained before, during, or after therapy. Even a cursory review of the literature belies the assertion that "Very few [case histories] are book length expositions concerning a single person or family," and that in such cases, consent might readily be obtained. See, e.g., Deutsch, H., NEUROSES & CHARACTER TYPES (1965) (no mention of consent); Rosenthal, D., ed., THE GENAIN QUADRUPLETS (1963) (no mention of consent); Thigpen, C. and Cleckley, H., THE THREE FACES OF EVE (1957) (no mention of consent); Parker, B., A MINGLED YARN: CHRONICLE OF A TROUBLED FAMILY (1972) (one daughter gave consent for case history of whole family); Lindner, R. M., REBEL WITHOUT A CAUSE (1944) (subject gave consent but others identifiable in case history did not). Besides these book-length case histories not discussing consent, there are many in which consent was obtained, though often it is unclear whether the consent was valid —if *amici's* contentions are correct—because there is no mention of whether it was given before, during or after therapy. Dewald, P. A., THE PSYCHOANALYTIC PROCESS: A CASE ILLUSTRATION (1972); Baruch, D., ONE LITTLE BOY (1952); Milner, M., THE HANDS OF THE LIVING GOD (1969). In the preface to one of Sigmund Freud's book-length case histories, FRAGMENT OF AN

> "The claimed justification for publication, resting on the alleged consent of plaintiff and the attempt to disguise her identity, does not provide a sufficient valid basis for denying the [preliminary injunction]" (A104).

To begin with, it is mind-boggling to argue that where both an opinion (A103) and an order (A108) recite *affirmance*, except for a specified modification, and there is not even a word about reversal, this must somehow be regarded as a reversal. *Amici's* argument, moreover, completely ignores the statement, appearing in no less than *three* dispositions issued by the Appellate Division,[8] that its decision was made as a matter of law. Even in the absence of such statements, an equally reasonable reading of the sentence in question, is that it takes no position on the facts, but simply holds, as a matter of law, that the defenses raised by the petitioners, even if true, are insufficient.

Indeed, the *amici* themselves concede that "this ruling is less specific than might be desired" (Brief at p. 29), and this concession alone is fatal to their contentions, for this Court's decisions make manifest that only a clear, specific finding as to the relevant facts could possibly overcome

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ANALYSIS OF A CASE OF HYSTERIA, Freud explicitly states that he neither asked for nor obtained consent. VII THE COMPLETE WORKS OF SIGMUND FREUD (Standard (Hogarth) 1935 ed.), at 7. A footnote later added to this preface states that, in his remaining book-length case histories, he obtained consent, but makes no mention of when it was obtained. *Id.* at 14. ANALYSIS OF A PHOBIA IN A FIVE-YEAR-OLD BOY; NOTES UPON A CASE OF OBSESSIONAL NEUROSIS; PSYCHOANALYTIC NOTES ON AN AUTOBIOGRAPHICAL ACCOUNT OF A CASE OF PARANOIA; FROM THE HISTORY OF AN INFANTILE NEUROSIS.

[8] Opinion, at A103; Order, at A107; and Order Granting Leave to Appeal, at A125.

the heavy burden of presumptive unconstitutionality borne by a prior restraint. See petitioners' opening brief, pp. 9-20. While the courts may occasionally relax their standards of clarity and precision in reviewing the findings of such lay persons as Selective Service local board members, see, e.g., *United States* v. *Andrews,* 466 F.2d 1086, 1088 (10th Cir. 1971) ("... [B]oards of volunteer laymen cannot be expected to make court-like findings of fact."), courts, at least, can indeed be expected to make court-like findings. This Court can, and must, demand more of judges trained in the law, before permitting to stand a decision affecting such basic, fundamental rights as the right to publish under the First Amendment.

C. *The legal basis of the decisions below is nowhere articulated in the record.*

Not only have the courts below failed to set forth any factual basis for their actions, but they have failed to identify in any way the legal basis for the injunction here under review, and for this reason, too, the decision below must be vacated.

The opinions of the courts below which troubled to write opinions at all are so vague as to their legal bases that the *amici curiae* APA *et al.* are able to identify no fewer than five possible "potential justifications" for the affirmance of the injunction,[9] but do not appear to endorse any of them enthusiastically. Respondent accepts most of these, and

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[9] "[C]ommon law contract, state licensing statute, common law tort privacy, state privacy statute, and constitutional privacy right ..." (Brief, p. 23). Because of this proliferation of possible decisional rationale, and the failure of the state courts to articulate any of them—or any other—*amici* are correct in their assertion that the decisions below are "unclear as to the source of respondent's legal protection" (Brief, p. 26).

adds her own.[10] These numerous *post hoc propter hoc* "justifications" demonstrate even more conclusively that the "cryptic and somewhat inconsistent" (*Amici*, p. 10) state court decisions nowhere identify that which the state courts purported to be protecting, and by no means identify any interest of greater magnitude than the First Amendment. Thus, any injunction based on those decisions must unquestionably be vacated. There is plainly no warrant for the *amici's* argument (pp. 18 *et seq.*) that, because it is impossible to determine the legal basis of the decision below, the writ of certiorari should be dismissed (see Point III, *infra*). The very question which is presented to this Court by the petition for a writ of certiorari is whether a state may enjoin the distribution of a book, when its reasons for doing so cannot be divined.[11]

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[10] Respondent somehow seeks to create injunction-generating authority in Civil Practice Law and Rules §4504(a) (Brief, pp. 36-37) which establishes in New York the testimonial privilege which most states provide to doctors in their courts. Aside from the fact that the statute obviously contemplates a situation in which the patient is identified, publicly, and by name, in open court, it is respectfully submitted that a statute regulating civil practice in a state's courts is an odd place, indeed, to look for a provision regulating what books its citizens may write.

[11] Nor is there any warrant for the assertion by *amici* that constitutional analysis will vary greatly, depending upon the various labels which might be attached to respondent's cause of action; this Court has made it abundantly clear that such "mere labels" cannot affect analysis of fundamental constitutional issues. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419-420 (1971); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964).

POINT II

The injunction constitutes an impermissible prior restraint.

Respondent contends for a definition of the term "prior restraint" which is convenient for her argument, but which is manifestly preposterous. Even if the definition proposed by the respondent is conceivably a correct one, however, it is plain that the proceedings in the courts below have failed to comply with the required standards, and the injunction is improper.

Respondent argues that the sole instance in which a prior restraint is to be found, is in the case of a "curb on communication imposed by law or originated by an agency of the government, where there is no assurance of an adversary court proceeding to test the validity of the restriction before, or immediately after, it is imposed" (Brief, p. 17). This incredible doctrine, obviously, would permit no less than a total, blanket system of pre-publication licensing of every book, magazine, newspaper, film, speech, and recording—a system irreconcilably at odds with the accepted understanding of the system of free expression which has historically prevailed in this country. Plainly, a system allowing blanket restraint of communication, before there has been a full and proper judicial determination of reasons why the material is undeserving of the protections of the First Amendment, is precisely the type of presumptively unconstitutional prior restraint against which this Court has so strenuously guarded over the years—and it is precisely the type of restraint which

has been imposed in this case, despite respondent's efforts to make it appear otherwise.

Even if the respondent is in part correct, and a preliminary injunction against publication of a book could, in some conceivable circumstances, be held proper, the issuance and affirmance of the injunction here under review cannot be found to be correct, because there simply has been no determination of the harm sought to be prevented by the restraint imposed. It is this incontrovertible and ineradicable error in the proceedings below which distinguishes all of the cases cited by respondent, and which belies all of her labored attempts (Brief, pp. 23-28)[12] to demonstrate that the means by which the injunction was issued complied with the requirements of due process and of the First Amendment.

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[12] All of these efforts are for nought, since even a summary evidentiary hearing, theoretically allowable under §2218 of the New York CPLR, is subject to the court's discretion, and not a matter of right; where the factual questions are difficult and complex, the New York courts will be reluctant to grant such a hearing. *Stowell* v. *Berstyn*, 26 A.D.2d 828, 274 N.Y.S.2d 120 (2nd Dept. 1966). Moreover, because of the extensive factual questions in this case, any such hearing would have been meaningless without adequate pre-hearing discovery. *Amici* concede that full resolution of this case "would obviously have required at least several months" (p. 27). Respondent (pp. 26-27) taxes petitioners' counsel's view that an early trial would not have been feasible because of the vast amount of factual matter which must be unearthed in extensive pre-trial discovery of respondent. Respondent then indulges in non-record and unfair description and characterization of the attempts to complete the deposition of the plaintiff-respondent. It has indeed required parts of six days to complete and the final session was held on December 10, 1974. In petitioners' view the reasons for the delay were the scores of improper objections interposed, and the deliberate efforts on the part of respondent to frustrate petitioners' efforts to obtain a thorough factual account of her claims. It is interesting to note that prior to the outset of respondent's pre-trial examination of petitioner, Dr. Roe, commenced on December 11th, respondent's counsel stated that the examination would take at least several days.

In each of the cases cited by the respondent as approving prior restraints, the courts held the restraints to be justified only because of the demonstrated existence of carefully defined, limited, special circumstances—none of which are shown to be present here—which provided a reason for subordinating the ordinarily imperative commands of the First Amendment. Thus, in those cases involving the disclosure of information asserted in some way to be "secret" or "confidential," the identity of the injured party was either absolutely clear,[13] or need not have been specifically disclosed in order to cause the injury.[14] Similarly irrelevant are such picketing cases as *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), in which it had been clearly established that the picketing in question was closely bound up with extensive union violence, and *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490 (1949), in which it had similarly been clearly established that the picketing was being conducted by truck owner-operators in furtherance of an illegal antitrust conspiracy.

The obscenity cases offered by respondent likewise do not advance her argument. In both *Paris Adult Theatre I*

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[13] *Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. den.* 398 U.S. 960 (1970) (films of patients); *Clayman* v. *Bernstein*, 38 Pa. D & C 543 (1940) (photographs of patient's face); *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N.Y.S. 800 (1st Dept. 1932), *aff'd* 261 N.Y. 504, 185 N.E. 713 (1933) (film of plaintiff); *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1st Dept. 1920) (same). *Blumenthal* and *Feeney*, moreover, were decided decades before this Court made clear the application of First Amendment protection to motion pictures, in *Burstyn* v. *Wilson*, 343 U.S. 495 (1952), and contain not a word of discussion of constitutional issues.

[14] *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, 42 U.S.L.W. 4631 (1974) (trade secret); *United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. den.* 409 U.S. 1063 (1972) (national security).

v. *Slaton*, 413 U.S. 49 (1973), and *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957), there had been a *final* determination in the courts below, after *full* trial of the issues, that the works in question were obscene and therefore beyond First Amendment protection. Most egregiously distorted is respondent's description of *Kingsley*, that it " . . . involved a statute that authorized the issuance of a preliminary injunction (and a permanent injunction after trial) . . . . The Court held that the statutory scheme was not an unconstitutional prior restraint . . . " (Brief, p. 20). Contrary to respondent's implications, however, a reading of *Kingsley* makes clear that all that was before this Court, and all this Court passed upon, was the final injunction issued after full trial on the merits, which had led to a final judgment that the material was obscene.[15]

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[15] It is for this reason, of course, that petitioners referred to *Kingsley* as an "irrelevant" obscenity case, a statement which appears so to perplex respondent (Brief, p. 22). By thus misconstruing petitioners' argument, respondent reaches the ridiculous conclusion that under it "all one need do is make that accusation [of obscenity] against the book", for a constitutionally permissible injunction to issue. There is, of course, no warrant for such an argument, although the reason respondent makes it is plain—she indeed has been required to do little more than make the accusation that the book identifies her, in order to obtain the injunction. Nevertheless, respondent continues to make accusations and insinuations of obscenity and pandering (pp. 7, 8, 10, 22, 23), in addition to totally improper attacks on the scientific content of the book (pp. 10, 23 at n. 1). It is therefore interesting to note that *amici*, on the contrary, characterize the book as "scientific speech" (p. 39). Moreover, Dr. Alan A. Stone, Professor of Law and Psychiatry at Harvard University, who assisted in the preparation of the brief for *amici* (see p. 47), in a letter to petitioner Dr. Roe which explained his support of the *amicus* brief, and set forth his view that the book should not be distributed "against the wishes of your patient", even if Dr. Roe prevailed in the legal proceedings, observed that the book "is a moving document and a serious document . . . . It is not cheap sensationalism, nor pretentious jargon. It is in the tradition of humanistic psychology with which I deeply empathize" (Letter dated August 22, 1974).

This Court has recently observed that "The special vice of a prior restraint is that the communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 390 (1973). Mr. Justice Powell's statement precisely describes what has occurred in this case. Even if this Court should hold, as a matter of federal constitutional law, that a state may prevent the publication of a medical case history in which the patient's identity is inadequately disguised,[16] there is simply nothing in this record which demonstrates that the state courts found the patient here to be inadequately disguised, or, indeed, to indicate any reason for them to have issued the injunction.

It is this fact also which contradicts respondent's lengthy attempt to show that the procedures employed below accorded enough due process that the injunction must be held to be valid. See note 12, *supra.* Respondent's argument here in fact reduces almost to the circular one that, *because* the courts below issued and affirmed the injunction, they must be *presumed* to have acted properly. Petitioners' entire argument, however, is that the courts below, as the record clearly demonstrates, have failed to place any serious burden on the respondent, of showing a high degree of likelihood that she can be identified in the book—a violation of the requirements of state law, which was argued in the courts below, and a violation of constitutional law, which was argued both in the courts below, and in this Court.

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[16] For an argument that no such cause of action should be recognized, inasmuch as the medical profession can be expected to develop its own ethical codes, see "Legal Protection of the Confidential Nature of the Physician-Patient Relationship", 52 COLUM. L. REV. 384, 398 (1952). See also "Medical Practice and the Right to Privacy", 43 MINN. L. REV. 943, 961-962 (1959).

Nor, of course, is respondent correct in taxing petitioners with failure to seek a testimonial hearing (Brief, pp. 24, 25). If there were questions of fact not resolvable upon the written affidavits before the court, then, as a matter of both state law and of constitutional law, the injunction should not have issued. In addition, as this Court has often held, it is totally improper to place the burden of going forward upon the party seeking to publish; if a testimonial hearing was required to resolve disputed questions of fact, it should have been sought by the one seeking to ban the book. See *Blount* v. *Rizzi*, 400 U.S. 410, 417-418 (1971); *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965).

In sum, even if this Court should accept the respondent's notions as to what is required before the enjoining of a book may be permitted, even that patently inadequate standard has not been met, and the proceedings in the courts below do not remotely approximate even the most minimal constitutional requirements which must be met before a state may abridge the rights guaranteed by the First Amendment.

POINT III

This case presents a final decision, ripe for review by this Court, and certiorari was properly granted.

Respondent urges upon this Court the contention that certain of the questions discussed in petitioners' opening brief, principally the constitutional standards which must be met before a state may establish a cause of action which affects First Amendment rights, are not properly before this Court (Brief, pp. 12-15). The *amici* make a related argument, that the record is not sufficiently developed for

this Court to reach a decision upon all of the far-reaching issues presented by this case, involving the resolution of the conflicting claims of medical science and the First Amendment on one hand, and patients' rights to privacy or confidentiality on the other (Brief, pp. 18-27).

In part, petitioners are in agreement with these arguments. The courts below have required the respondent to make almost no showing at all to justify the grant of the injunction in this case, particularly if her incredible argument (Brief, p. 36, n. 1) is accepted, that she need not even have shown she is identified, in order to have a cause of action. This Court need not resolve any significant issue of necessary standards of disguse, in order to vacate a restraint on publication where the restraint is expressly posited upon no countervailing interest whatsoever. Even the most avid advocate of the "balancing test" in First Amendment analysis must have *something* to put in the balance opposite the right of free expression.[17]

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[17] It is nevertheless surprising to find that *amici*, three professional associations of psychiatrists and persons in related fields, who "have a keen interest in the advancement of scientific learning through the publication of case studies" and who cherish the "ability to propagate ideas through publication" (p. 4), express a truncated view of the extent of their own First Amendment rights. On page 39 *amici* contend that not only the case history involved in this case, but "scientific speech" in general, is entitled to less First Amendment protection than other categories of expression, specifically speech which criticizes government and public officials. While such a parsimonious view of the First Amendment has received some limited advocacy, see Bork, "Neutral Principles and Some First Amendment Problems", 47 IND. L.J. 1 (1971), petitioners are not aware of any decision by this Court which has supported a second-class status for scientific speech. On the contrary, this Court has held, "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). Moreover, in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967), this Court affirmed that it

Only if this Court is able to detect some standard applied by the courts below in justifying the enjoining of petitioners' book, need it reach the further issues presented by this case—but if this Court is indeed able to detect the standard, then it is faced squarely with the question of whether that standard meets the requirements of the First Amendment. The injunction plainly cannot be permitted to stand unless it so complies. While petitioners believe that the injunction can only be found valid if it rests upon a cause of action for reckless failure to disguise the patient,[18] this Court need reach that issue only if it finds

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was the intent of the constitutional founders "that a free press would advance truth, science, morality and the arts in general, as well as responsible government." Accord: *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1939) ("... all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period."); see Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 HARV. L. REV. 1, 13 (1965) ("Education and all its phases, the achievements of philosophy and the sciences, literature and the arts, all fall within the subjects of 'governing importance' that the First Amendment absolutely protects from abridgement"); see also Hastie, "Free Speech—Contrasting Constitutional Concepts and Their Consequences", 9 HARV. CIV. RTS.-CIV. LIBS. L. REV. 428, 434, 435 (1974).

[18] This is the standard applied in an analogous context involving a clash between a privacy claim and the First Amendment, in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). See petitioners' opening brief, pp. 32-35. Respondent's brief strains mightily (pp. 47-51) to distinguish *Time* from this case, on various grounds, including the elements of newsworthiness and falsity, both present in *Time*. These arguments were virtually anticipated in an analysis of *Time* by a respected scholar in this field: "Although the *Time* decision is expressly limited to cases involving fictionalized reports or articles about newsworthy persons, there can be little doubt that its logic would extend *a fortiori* to cases involving true accounts. If the First Amendment protects fictionalized accounts of private lives absent malice, why would it not protect true accounts?" Bloustein, "Privacy, Tort Law, and the Constitution", 46 TEX. L.R. 611, 622 (1969). And in a much cited article written before *Time*, the late Prof. Harry Kalven suggested that "liability for

that the record below clearly establishes a failure by the petitioners to disguise the patient.[19]

It is for this reason that *amici* are clearly erroneous in asserting that certiorari should be dismissed. Whatever facts might be established after a full trial—and whatever facts might have been developed by the courts below, had they taken more care with these sensitive issues—the record of this case now presents clearly a decision by the courts of the State of New York, final in that it is otherwise unreviewable, that with no showing of harm at all, an injunction could issue against further distribution of a book protected by the First Amendment. No further proceedings, and no further development of the facts, and no more extensive or careful reflection upon trial, will have any effect at all upon this incredible decision, and this Court must vacate the injunction to remedy, to whatever extent remains possible, the intolerable damage already done to the one most basic and indispensable constitutional liberty.

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disclosing a truth about the plaintiff would at most be actionable only if the defendant published with bad motives." Kalven, "Privacy in Tort Law", 31 LAW & CONTEMP. PROB. 326, 335 (1966).

[19] *Amici* suggest a standard of "no reasonable likelihood that the subject can be identified" (p. 30), but without any reasoned critique of petitioners' proposed standard of "reckless failure to disguise", or its genesis in *Time, Inc.* v. *Hill*, *supra*, and without any authority in support of such a proposal. Compare "Medical Practice and the Right to Privacy", 43 MINN. L. REV. 943, 948-949 (1959). Respondent, on the other hand, posit an extreme standard of absolute liability, even where there is "innocent failure to disguise sufficiently" (p. 51), and incredibly, even where there is no disclosure of identity (p. 36). Thoughtful comments on the subject, in both legal and medical journals, have recognized that no standard would be satisfactory which did not allow for publication of properly disguised case histories. See "Extrajudicial Truthful Disclosure of Medical Confidences: A Physician's Civil Liability," 44 DEN. L.J. 463, 464 (1967); Hollender, "Privileged Communications and Confidentiality", 26 DISEASES OF THE NERVOUS SYSTEM 170, 173 (1965).

In 1905, Dr. Sigmund Freud exhibited remarkable prescience concerning the dilemma of the physician who is publishing a case history:

> "[I]n my opinion the physician has taken upon himself duties not only towards the individual patient but towards science as well; and his duties towards science mean ultimately nothing else than his duties towards the many other patients who are suffering or will someday suffer from the same disorder. Thus it becomes the physician's duty to publish what he believes he knows of the causes and structure of hysteria, and it becomes a disgraceful piece of cowardice on his part to neglect doing so, so long as he can avoid causing direct personal injury to the single patient concerned. I think I have taken every precaution to prevent my patient from suffering any such injury." VII THE COMPLETE WORKS OF SIGMUND FREUD (Standard (Hogarth) 1953 ed.), at 8-9.

Notwithstanding all of Dr. Freud's precautions, and even if they were approved as sufficient by the unanimous professional judgment of his colleagues, under respondent's view, the book would be enjoined, and the physician would be liable in damages, if the patient could establish that she was identifiable, and under the view of *amici*, if a court should simply hold that Dr. Freud's precautions were insufficient. The doctor's dilemma has not fundamentally changed in seventy years. While this case cannot completely resolve the dilemma, affirmance of the injunction will terribly exacerbate it, but reversal will substantially relieve it, and at the same time vindicate First Amendment principles, not only for the doctor who publishes, but for the people who read.

CONCLUSION

For all of the reasons set forth herein, and in petitioners' opening brief, the decision below must be reversed, and the injunction must be vacated.

Dated: New York, New York
December 13, 1974

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1446

JOAN ROE, PETER POE AND COE PRESS, INC.,

Petitioners,

v.

JANE DOE,

Respondent.

MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC.,

Petitioners,

v.

JANE DOE,

Respondent.

MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Preliminary Statement

The Association of American Publishers, Inc. (hereinafter referred to as the "AAP") hereby seeks leave to file a brief *amicus curiae*, pursuant to Rule 42 of the Rules of the Supreme Court in support of petitioners. Counsel for petitioners has granted consent to the filing of a brief by the AAP, but counsel for respondent has declined to grant such consent.

Interest of the AAP

The AAP is a not-for-profit trade association organized under the laws of New York State and is composed of more than 200 publishers of general books, textbooks, medical books and educational materials. It is estimated that its members publish approximately 85% of all such books and materials produced in the United States.

This case is on review from the granting of a preliminary injunction by the Supreme Court, New York County, at Special Term, which injunction was modified and affirmed by the Appellate Division, First Department and which, as modified, was affirmed without opinion by the New York Court of Appeals. The injunction is a prior restraint on the distribution of a book written by two of the petitioners and published by the third. The injunction was granted at the request of the respondent on the allegation that the book, which concededly is a psychiatric case history of the respondent and her family, is a violation of her right of privacy.

None of the parties in this proceeding is or has been a member of the AAP, including the publisher in question, and neither the AAP nor any of its members has any direct business interest in the distribution of the book in question. Nonetheless, the granting of a preliminary injunction by the courts below is of grave concern to the AAP and its members.

Although the competing interests of informing the public and protecting confidences are not exclusively faced

by publishers of medical or scientific works, it should be noted that approximately twenty of the AAP's members do publish some medical texts and of those twenty, three do so almost exclusively. Moreover, there are some thirty non-AAP member publishers engaged in the publication of medical and scientific books. That the case history method of disseminating information and teaching is as standard and important in medicine as in law is a matter of judicial notice. Indeed, every year a significant number of books including case histories are published by AAP members and others. Some of these, such as the well-known works of Masters and Johnson, are distributed to lay audiences and provide valuable information to those outside of the medical-scientific communities. As noted by Special Term in its opinion, it is "a well established practice in the medical profession for physicians to publish reports of interesting cases . . . and Freud published accounts of the analysis of some of his patients in this way."

The AAP's member publishers, as a matter of policy, believe that such case histories should be published only when consent is granted and/or where the author has disguised the subject of the work sufficiently to avoid identification. By applying these criteria, the potential privacy/First Amendment conflict resulting from the publication of case histories need not be an intractable problem.

In this case, Special Term found the facts, in pertinent part, to be as follows:

> "Defendants claim that the book is of scientific value; I do not think it is for judges to rule that it is not.

> And defendants have taken some steps to disguise the identity of the patients. I think those steps reasonably meet the usual standards for such disguising of the patients' identities. While I have not read this 1,000 page book, the examples of possible identification given by plaintiff in the moving affidavit must be assumed to be the more striking ones; I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient."

The AAP submits, therefore, that since the publication reasonably disguised the identity of the respondent in accordance with "usual standards", there was no basis to overcome the First Amendment prohibition against prior restraints of the dissemination of information in the form of a book.

A prior restraint on the distribution of a book of scientific value was, thus, here granted with only the most fleeting reference to the First Amendment prohibition against such restraint in two of the lower courts—which wrote a total of five pages on the entire case—and with no opinion whatsoever by the Court of Appeals of the State of New York. In short, the courts below failed to give sufficient weight to the dictates and principles of the First Amendment and they failed to honor the "heavy presumption against . . . constitutional validity" of "prior restraints of expression." (*Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963)).

The AAP notes that the brief of respondent in opposition to the Petition for Certiorari is devoted heavily to contesting the facts found below. Should this Court determine, as respondent contends, that consent was not given,

that reasonable steps to disguise respondent's identity were not taken, that respondent is identifiable and that immediate, direct and irreparable harm will result to respondent if the injunction is not continued, then, under all of these circumstances, a prior restraint such as that granted below might be warranted. To sustain a prior restraint against a book in the face of a privacy claim on any other basis would be to enhance the publisher's risk to such an intolerable extent that books of scientific value utilizing case histories simply will not be published. And, if because of injunctions such as that granted below, publishers as a group are deterred from publishing case histories where the identities are reasonably disguised, the public at large will suffer and the First Amendment shall have failed in its historic purpose.

In view of the foregoing, the AAP seeks leave to file the brief following hereafter.

Respectfully submitted,

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No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC.,

Petitioners,

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Respondent.

BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Interest of the AAP

This is set forth above in the motion to the Court.

ARGUMENT

POINT I

The courts below failed to accord the First Amendment the priority that this Court has repeatedly required.

Although the courts below, with the notable exception of the Court of Appeals which affirmed without opinion, make fleeting references to the First Amendment guarantees, the AAP believes that they failed to give to those guarantees the weight and importance to which they are entitled and which, indeed, are required by any number of opinions of this Court. In short, the State courts failed to acknowledge the firstness of the First Amendment.*

The need for the press to flourish has been so consistently recognized by this Court that it has continually acknowledged that some abuse is inevitable and must be tolerated. Most recently, Mr. Justice Powell reiterated this tenet in his opinion for the Court in *Gertz* v. *Robert Welch, Inc.*, 42 USLW 5123, 5128 (1974), wherein he stated:

> "As James Madison pointed out in the Report on the Virginia Resolutions of 1798, 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than that of the press.' 4 Elliot's Debates (1876), p. 571. And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."

* See *e.g.*, F. Frankfurter, Mr. Justice Holmes and the Supreme Court, 74-76 (2d ed. 1961).

The New York courts appear to have either ignored or rejected this fundamental tenet of our system. Their treatment of the case simply indicates that their concern with potential personal harm to respondent caused them to discount First Amendment dictates.

The priority of the First Amendment protections applies to all types of speech, not just political speech. And clearly it applies to the non-fictional content of the book here in question. As stated by Mr. Justice Harlan in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967): "The founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government." And in *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940), the Court stated:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Of course, the guarantees of the First Amendment include not only the right of the author and publisher to express and disseminate information, but even more importantly, the right of the public to obtain access to and receive information. And the information to which the public is entitled is not simply information of a political nature. Indeed, it is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969); cf. *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

The issue in *Time, Gertz* and other cases coming to this Court in the privacy or defamation areas has been that of liability *after* publication for money judgments. Although those cases did not deal with the serious prior restraint issue here in question, the Court's concern with the freedom of the press was manifest. In considering the existence or potential for large judgments imposed against the press, this Court has been vigilant to prevent the erosion of First Amendment rights through the chilling effect of the imposition or the potential risk of large judgments.*

Here, of course, the First Amendment claim is far more direct than that of a potential chilling effect. The actual dissemination of the ideas and information contained in the book in question has been stopped by reason of the injunction granted below. Yet it is important to remember that the injunction against distribution of this book, while direct in restraining its further dissemination, also has a chilling effect on the willingness of other publishers to publish other works utilizing case histories. The injunction granted below, based as it is on the facts as found by the courts below, may well instill fear in other publishers causing them to turn down possibilities of publication and/or distribution.**

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* Accordingly, in *Gertz, supra,* this Court has now held that presumed or punitive damages may not be recovered in libel cases in the absence of a showing of knowledge of falsity or reckless disregard for the truth and that, for any recovery, fault of some degree must be shown.

** Special Term found that respondent's identity had been reasonably disguised in accordance with "usual standards." The AAP believes this is indeed the procedure applied by responsible publishers of case history type publications.

In failing to recognize the full scope and clear preeminence of the First Amendment in the issues of the case before it, the courts below violated basic constitutional commands which, if not corrected by this Court, will severely impair the rights of all publishers and the reading public at large.

POINT II

The preliminary injunction granted below constitutes an invalid prior restraint.

In discussing the validity of the preliminary injunction granted below, the opinions of the Special Term and the Appellate Division tacitly admit that the preliminary injunction here in issue does constitute a prior restraint. And, indeed, it does.*

Valid prior restraints are exceptions to the rule. The elimination of prior restraints was a single "leading purpose" of the First Amendment.** The constitutional invalidity of prior restraints was set forth succinctly by

* Any contention that the restraint here is not "prior" because the injunction only issued after publication and after distribution of a few hundred copies is fallacious. In *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175 (1968); and *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971) the expression as to which those injunctions applied had already occurred and yet, this Court reversed those injunctions as invalid prior restraints. Moreover, in *Near* the injunction was permanent, not preliminary; and in *Keefe* the injunction was found by this Court to be, for all intents and purposes, equivalent to a permanent injunction because among other reasons, there were no facts in dispute. (*Keefe* at 418, n. 1.) Here, of course, both parties acknowledge that there are hotly disputed facts.

** *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, 181, n. 5 (1968).

Mr. Chief Justice Hughes in *Near* v. *Minnesota*, 283 U.S. 697, 713 (1931), wherein he stated, for the Court:

> "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."

In *Near*, this Court struck down an injunction which prevented the publishers of a newspaper from printing a "malicious, scandalous or defamatory newspaper" because it did constitute a prior restraint.

Although the facts and/or the competing interests have varied in each prior restraint case to come before this Court, the holding of *Near* has never been diluted; it has been ever re-enforced. In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963) no injunction against expression had issued, but a state-supported system of informal censorship was struck down, with the Court noting that: "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." And in *Carroll* v. *Commissioners of Princess Anne, supra*, this Court reversed an order which restrained a white supremacist group from holding a rally, notwithstanding the fact that the subject and participants in the rally suggested the possibility of a "clear and present danger" of physical violence.

More recently, in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971) this Court again asserted that a party seeking such injunctive relief against expression "carries a heavy burden of showing justification for the imposition of such a restraint." The facts and reason-

ing in the *Keefe* case are most applicable to the case at bar as they demonstrate that a right to privacy will not easily displace First Amendment rights from their favored position. There, the defendants engaged in the distribution of leaflets protesting the alleged "blockbusting" activities of the plaintiff; the site of the leafletting was a suburb in which the plaintiff lived, seven miles from the business district where he had his office. Plaintiff obtained the order preliminarily enjoining defendant from leafletting in the suburb, on the ground that the proximity of these activities to his home constituted an invasion of privacy. In reversing the injunction, this Court by Mr. Chief Justice Burger reasoned the facts of the case as follows:

> "Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record . . . respondent is not attempting to stop the flow of information into his household, but to the public." (at 419-420)

The Court's most recent opportunity to consider the issue of prior restraints was the case of *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). There, in a *per curiam* decision (for six concurring Justices) this Court reversed an injunction granted by the Court of Appeals for the Second Circuit because it was found that the government had not met the heavy burden to justify the imposition of a prior restraint upon the publication by *The New York Times* of the Pentagon Papers. Although the Justices in the Pentagon Papers case differed as to whether the restraint issued by the Circuit Court, pending review by this Court, was proper or unconstitutional, "every mem-

ber of the Court, tacity or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional."* While the Chief Justice dissented in the Pentagon Papers case, he opened his dissenting opinion in *New York Times Co., supra,* at 748 as follows:

> "So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near* v. *Minnesota,* 283 U.S. 697 (1931), until recently in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication."

Cases where this Court has rejected a contention that an improper prior restraint has issued are few. Respondent appears to rely on *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973) as one such case. There, the Court by Justice Powell found not that a prior restraint was permissible, but that there was no prior restraint. In discussing this issue, Mr. Justice Powell noted that:

> "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." (at 390)

There, the Court found that there was not a prior restraint of First Amendment expression because no interim relief

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* *Pittsburgh Press Company* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 396 (1973) (Chief Justice Burger dissenting).

was granted, the speech involved was found to be commercial speech under the exception of *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) and because the Court was not called upon to speculate as to the effect of publication.

Equally misplaced is respondent's reliance on *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957) and *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971). Both of those cases dealt with obscene materials and rested on this Court's holding in *Roth* v. *United States*, 354 U.S. 476, 481 (1957) that "obscenity is not protected by the freedoms of press and speech."*

To date, therefore, restraints such as the one present here have not been sanctioned by this Court. The AAP submits that the facts here simply do not fall within any of the narrow exceptions suggested in *Near* and reviewed by Mr. Justice Brennan in his concurring opinion in the Pentagon Papers case. Absent one of these exceptions, "the First Amendment tolerates absolutely no judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."**

In view of the foregoing, the AAP submits that respondent simply has failed to meet the "heavy presumption" against prior restraints of expression.

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* See *New York Times Co.* v. *United States*, *supra* at 726, n.1 (Justice Brennan concurring).

** *New York Times Co.* v. *United States*, *supra* at 725, 726 (Justice Brennan concurring).

POINT III

Only different findings of fact could warrant the injunction imposed below.

There is no question but that Special Term specifically found that the steps taken by petitioners "reasonably meet the usual standards" for disguising the respondent's identity and that respondent is not identifiable. As we have argued above, this record thus affords no basis to overcome the First Amendment prohibitions against prior restraints.

Notwithstanding these clear findings below, respondent seeks to relitigate those factual issues in this forum. Of course, whether this Court feels a duty to engage in fact finding at this stage is within its discretion. The AAP submits, however, that the injunction cannot be preserved on the basis of the record herein and the findings below.

The respondent can possibly overcome the heavy presumption against prior restraints, the AAP respectfully suggests, only if this Court makes its own factual findings that: (1) no consent was given, (2) respondent is identifiable as the subject of the book, (3) petitioners were at fault in failing to take reasonable steps to disguise the identity of the respondent in a work which on its face is clearly intimate, embarrassing and injurious and (4) respondent will suffer "direct, immediate and irreparable" damage if distribution is not enjoined.

In sum, to prevent a chilling effect on this type of expression in the future, the Court should: (1) apply nothing short of the same strict standard of harm which it required of the government in the Pentagon Papers case, *supra* at 730 (Justice Stewart concurring), and (2) impose on the

publisher no more than the obligation of reasonable prudence in the face of material which "makes substantial danger to reputation apparent" than it did in *Gertz, supra,* at 5131, n. 11, citing *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (1967).

The AAP submits that only this suggested approach can prevent claims of and concerns with personal privacy from colliding head on with the First Amendment and creating yet another intractable problem with which publishers and others, including the judiciary, will be faced in the future.

Above all, however, the AAP fears any encroachment on the time-honored constitutional prohibitions against prior restraints. Respondent has, on the basis of the record and findings herein, failed to overcome the heavy constitutional presumption that this Court has always applied. Accordingly, the AAP urges this Court to vacate the injunction and remand the case for prompt trial.

Conclusion

In view of the foregoing, the AAP respectfully requests that the injunction granted below be vacated.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE, AND COE PRESS, INC.,
Petitioners,

v.

JANE DOE,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PSYCHOANALYTIC ASSOCIATION, AND THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE, AND COE PRESS, INC.,
Petitioners,

v.

JANE DOE,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PSYCHOANALYTIC ASSOCIATION, AND THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Counsel for the American Psychiatric Association, the American Psychoanalytic Association, and the American Orthopsychiatric Association hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioners was requested but denied.

The instant case presents for resolution a conflict between a psychiatrist's right to publish a case study based on a patient's psychotherapeutic treatment and the patient's right to prevent disclosure of confidential communications made during treatment. Collectively, the above organizations represent more than 25,000 mental health professionals, almost all of whom are medical doctors practicing psychiatry. These organizations, therefore, have a unique interest both in the advancement of scientific knowledge through the publication of case studies, and in the need for confidentiality in fostering a climate that will encourage patients to seek treatment.

The above organizations believe that because of the fundamental values at stake, and in view of the inadequacy of the record below, this Court should dismiss the writ of *certiorari* either as improvidently granted, or because the preliminary injunction issued below is not a final judgment as required for this Court's jurisdiction under 28 U.S.C. § 1257. Petitioners have not addressed these issues in their brief, and counsel for the above organizations has been informed that respondent will not discuss them either.

Moreover, the above organizations believe that they can apprise this Court of the nature of the psychotherapeutic process, the importance of confidentiality to that process, and the customary professional standards used in the publication of case studies. All of these factors are critically relevant to this Court's determinations, and the above organizations believe that they will not be adequately briefed either by petitioners or respondent.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Psychiatric Association is a professional organization with a nationwide membership of more than 20,000 doctors of medicine who specialize in the treat-

ment and care of mental illness. The American Psychoanalytic Association is a professional organization with over 2,000 members nationally, almost all of whom are medical doctors, and all of whom have received special training in psychoanalytic theory and practice. The American Orthopsychiatric Association is a professional organization with a national membership of more than 4,000 psychiatrists, psychologists, psychiatric social workers, and persons in related fields who are concerned with the problems of mental health treatment. All three organizations are not-for-profit corporations.

Collectively *amici* have a strong commitment to the care and treatment of those in this country who need mental health assistance. The most effective way to insure adequate mental health care is to allow for early and preventive treatment on a voluntary basis before hospitalization becomes necessary. Thus, *amici* wish to foster an atmosphere that will encourage people to seek psychiatric assistance. To establish such an atmosphere requires strict assurance of professional confidentiality because patients in psychotherapy are often required to disclose intimate and embarrassing acts, thoughts, feelings and fantasies. These revelations include material that belongs to people's irrational and primitive selves, and which people often quite appropriately decline to share even with their closest loved ones. Indeed, some of these matters are so painful to the patient himself that they have been repressed—*i.e.*, removed from his own conscious memory and stored in his unconscious. In the therapeutic process this intimate and painful material is brought to consciousness and articulated only because it is essential for treatment. If, however, this material were disclosed to family, colleagues or friends the result would be devastating. Thus, unless assured of absolute confidentiality patients will be unwilling to seek the psychotherapeutic treatment necessary for restoration of mental health.

Amici also have a keen interest in the advancement of scientific learning through the publication of case studies. The case study is a unique method of presentation because it allows for detailed explication of therapeutic techniques in the context of real, rather than hypothetical, patient responses. Commencing with Freud, great contributions to our knowledge of mental processes have resulted from this form of presentation.

The instant case presents for resolution a conflict between the assurance of confidentiality required for effective psychotherapy, and the ability to propogate ideas through publication. *Amici* strongly support both of these competing values and seek to assist the Court in resolving this conflict so that neither value will be harmed any more than is absolutely essential.

STATEMENT OF THE CASE

Petitioners [defendants below] seek reversal of a preliminary injunction issued by the New York courts prohibiting distribution of a book entitled *In Search of a Response*. The book was co-authored by petitioners Dr. Roe and her husband, Peter Poe, and published by petitioner Coe Press. It is based on the psychiatric treatment of three former patients of Dr. Roe—respondent Jane Doe [plaintiff below], her ex-husband, who is now deceased, and her son.

Relationship Between Respondent and Dr. Roe.

Beginning in 1956, and continuing for more than six years thereafter, respondent, her husband, and son, were patients of Dr. Roe's who is licensed to practice psychiatry in New York. Respondent and her husband were treated separately, each usually meeting with Dr. Roe for three hourly sessions per week. At these sessions they were encouraged to express any thoughts or feelings, no

matter how discomforting or embarrassing.[1] The patients were also treated by Dr. Roe in group therapy, and it appears that Dr. Roe was a professional supervisor to respondent, who herself is a practicing therapist. (See *In Search of a Response*, Helena section at 354 n. 673.) Respondent's son saw Dr. Roe only occasionally, and the nature of his treatment is undisclosed.

While treating respondent's family, Dr. Roe prepared a manuscript based on their treatment. This manuscript was shown to respondent and her husband, and, as indicated in the book, was discussed during therapy sessions. Nevertheless, it was not published for more than ten years after termination of respondent's and her husband's treatment. "The delay," according to the affidavit of petitioners Roe and Poe, "is attributed to a number of factors, including our own desire for time to pass, the desire of plaintiff's late husband to postpone publication until after his admission to the Bar, the pressures of other professional responsibilities, and the extreme care and solicitude which we regarded as essential to the final editing and preparation of this work. . . ." (App. at 32.)[2] During this passage of time, respondent's then ex-husband died.

Respondent claims that in 1972 she learned from a colleague that Dr. Roe was about to publish a book. When the book was described to respondent, she recognized it as the manuscript that had been based on her family's treatment. Respondent's attorney thereupon wrote to Dr. Roe requesting an opportunity to view the

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[1] This technique, called "free association," requires the patient "to communicate every idea or thought that occur[s] to [him]. . . . It is necessary to insist explicitly on [the patient's] removing all intrusion of the thoughts that he perceives." Freud, "The Interpretation of Dreams," in 4 *Standard Edition of the Complete Psychological Works of Sigmund Freud* 100-101 (1958).

[2] *Amici* have been furnished a copy of the record below with respondent's name deleted.

proposed book "so that I can determine whether there has been a violation of your obligation not to reveal privileged communications between a doctor and patient, and further, whether your manuscript contains any libelous material or references." (App. at 20.) Dr. Roe replied that respondent "apparently has heard rumors that I am publishing a book and has assumed that it is about her." (App. at 21.) The letter then stated that the manuscript in question had already been given to respondent during treatment and that, at that time, she had consented to publication. The book was published approximately four months after the date of Dr. Roe's letter.

According to petitioner Poe, who is Dr. Roe's husband and co-author, and who himself is a practicing lay psychotherapist, the book is a diary of respondent and her husband based "on the notes, reproduced as closely as possible, of hundreds of therapeutic sessions." (*In Search of a Response* at viii.) The book consists of three sections. The first section is a brief internal monologue supposedly by respondent's son, who is labeled "autistic." It is essentially an imagined view of the child's feelings during his infancy and early childhood, emphasizing the failure of communication within the family, but particularly between mother and son. The second section of the book is a 354-page account of respondent's treatment. The patient is variously described as suffering from "post-partum psychosis," "schizophrenia," "catatonia," and "paranoid schizophrenia." (*E.g.*, *In Search of a Response*, Helena section at 8 n. 26, 26 n. 96, 91 n. 251, and 109 n. 302.) The final section is a 613-page account of the husband's treatment. He, too, is described as a "schizophrenic." (*E.g.*, *id.*, Henry section at 25 n. 61.) The sections concerning respondent and her husband are written as if the patients were talking to the doctor in a free-associative manner, with very few brief interruptions—written in italics and placed in parenthesis

—for questions and comments by the psychiatrist. There are also close to 2000 footnotes providing brief explanations by the authors of the patients' statements.

The subject matter of the patients' disclosures is often exceptionally intimate and personal. Respondent, for example, discusses at length her pre-marital sexual experiences, marital sexual experiences, extra-marital sexual experiences, post-marital sexual experiences, masturbatory experiences, homosexual fantasies, incestuous fantasies and feelings, excretory fantasies and feelings, sadistic fantasies, and violent acts and feelings.[3] The only efforts to disguise the patients appear to have been the changing of their names and the names of people discussed by them, and the portrayal of the patients as the parents of a single child when in fact they had two children.[4] Numerous identifying characteristics remain: age, religion, educational institutions attended, professional interests and accomplishments, the patients' divorce, the husband's remarriage to a female attorney, the son's autism, his early interest in music, and a suicide attempt by respondent's father.

Proceedings Below

After almost 200 copies of this book had been distributed to local bookstores, respondent sued for a pre-

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[3] *Amici* have decided not to reproduce examples of this material because it is possible that readers of this brief who know respondent may be able to identify her by the characteristics discussed at p. 30, *infra*. Nevertheless, to understand the intimate and embarrassing nature of these disclosures, one must read the book. See, *e.g.*, *In Search of a Response*, Helena section at 5, 6, 9, 11, 30, 33, 35, 59, 65, 76, 79, 82, 83 97 100-102, 155, 165, 168-72, 191, 227, 229, 249, 262, 275, 282, 290, 314, 319, 327, 331.

[4] Petitioners also claim that further disguise is effected because the locale is not mentioned. (Pet. Br. at 4 n.2.) On the contrary, the book's introduction reveals that at least some treatment occurred at petitioners' "place" in Katonah, New York, which is portrayed as a weekend or summer home. See *In Search of a Response* at viii-ix.

liminary injunction pending resolution of the suit, for damages resulting from the copies already disseminated, and for a permanent injunction against further distribution.[5] On the basis of affidavits filed by petitioners and respondent, as well as supporting affidavits and papers, and after oral argument by counsel, the trial court issued a preliminary injunction against distribution through channels "not reasonably calculated to be addressed to scientific readers." Distribution was permitted through universities, medical schools, text book stores, scientific book stores, and the like. (App. at 82-85.)

The trial court reasoned that when

> "[c]onfidential information is learned, in confidence, under a contract that it shall not be disclosed, I think an injunction will lie to restrain the unauthorized disclosure. . . .
>
> Here the defendants obtained information from plaintiff, under the implied, if not express, agreement that confidence would be respected . . . ." (App. at 83.)

The court went on to note the "countervailing" public interest in publication of medical case histories, and therefore concluded that only a limited preliminary injunction should be granted.

The trial court also discussed whether respondent could be identified in the book and whether she consented to publication, without indicating the relevance of these factors to respondent's cause of action. The court seems to have ruled that respondent's identity was adequately disguised. (App. at 83-84.) It also held that, as a

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[5] Petitioners point out that "significantly" respondent's ex-husband's new wife did not join in the action. (Pet. Br. at 3-4 n. 1.) None of this woman's confidences, however, have been published. Nor does the book disclose a great deal about her private life.

matter of law, only written consent, which petitioners did not allege, would suffice. (App. at 84-85.)

Defendants appealed the limited preliminary injunction to the Appellate Division of the state Supreme Court; plaintiff then cross-appealed. The unanimous panel modified the original injunction and prohibited all distribution of the book until further "order of the Court or until final judgment is rendered herein." (App. at 105.) The court also stated that "[a] preference shall be granted for an early trial upon application of either party." (App. at 105.)

The Appellate Division's opinion made no specific reference to the trial court's ruling based on contract, but rested instead on "the confidentiality accorded the physician-patient relationship" as well as "the expanding recognition of invasion of privacy actions." (App. at 104.) Similarly, the Appellate Division did not refer to the trial court's findings on disguise and consent, nor did it discuss the relationship between these factors and plaintiff's cause of action. Instead, the court simply stated that these justifications were not sufficient to defeat the preliminary injunction. See pp. 28-30, *infra*.

Defendants appealed the preliminary injunction to the New York Court of Appeals, which unanimously affirmed without opinion. This Court then granted *certiorari* to decide whether the preliminary injunction at issue violates the First Amendment as applied to the states through the Fourteenth Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves two important values that are in apparent conflict. On the one hand, there is the doctor's interest in publication purportedly protected by the First Amendment as embodied in the prior restraint doctrine. On the other hand, there are the patient's in-

terests in confidentiality, which is essential for effective mental health treatment, and in privacy, which is essential for a happy and productive life. The conflict between these interests is raised in this case because a doctor wants to communicate her ideas by means of a publication that reproduces a patient's treatment and therefore exposes the patient's most personal and painful thoughts, feelings, and fantasies. In seeking to resolve this apparent conflict between important values the Court should proceed cautiously in order to avoid jeopardizing any of the values unnecessarily. To do otherwise might result either (1) in eroding the important doctrine prohibiting prior restraints and, in effect, allowing for curtailment of speech that differs from the type presented in the instant case, or (2) in undermining, more than is absolutely essential, the individual's right to privacy and the confidentiality required for encouraging people to secure needed treatment.

Because careful and fully informed resolution of this basic conflict is critical, *amici* believe that the present case is unsuitable for review by this Court at this time. On a motion for preliminary injunction, with little opportunity for fact-finding and full argumentation, the state courts were presented with novel and complex questions of state as well as constitutional law. Moreover, these difficult legal issues were presented in a murky factual context—fundamental issues, such as whether respondent could be identified in the case study and whether she had consented to its publication, were vigorously disputed. Thus, the state courts were required in expedited fashion to make a preliminary determination as to whether dissemination should be curtailed only for the period of time required for a final resolution of the case on the merits. Not surprisingly, therefore, the opinions by the lower state courts are cryptic and somewhat inconsistent, and the New York Court of Appeals issued no opinion whatsoever. Accord-

ingly, in order to avoid establishing a *national* rule in so sensitive an area on such an inadequate record, this Court should, as a matter of sound judicial policy, either dismiss the writ of *certiorari* as having been improvidently granted or deny jurisdiction on the ground that the preliminary injunction entered below is not a final judgment within the meaning of 28 U.S.C. § 1257. If either course is taken a speedy trial on the merits will follow. And, *if* a permanent injunction is subsequently granted, this Court can review the case on the basis of a record presenting fully developed facts and clearly explicated law.

In urging this disposition, which would of course let stand the preliminary injunction entered by the courts below, *amici* are aware that any injunction against publication of a book—even an injunction *pendente lite*—raises important constitutional issues. Nonetheless, on the face of the present record it is clear that the countervailing interests in privacy and confidentiality are also great. These interests are such that if preliminary relief is not afforded, the harm to respondent will be truly irreparable. And, since the speech in question does not relate directly to political or governmental matters, the short delay in publication required for the state courts to resolve fully the issues raised will not deny the citizenry information which, because it is essential to democratic decisionmaking, is at the core of the First Amendment's protection. Indeed, there is nothing "timely" about the present book; the authors themselves have already delayed publication for more than ten years.

If, despite these considerations, this Court decides to consider the merits at this time, *amici* submit that the preliminary injunction should be affirmed. The most reasonable reading of the record below is that respondent is identifiable, and that she did not consent to publication. In these circumstances the harm from disclosure—both to the individual patient and to future

patients who will be deterred from seeking effective treatment—outweighs the narrow intrusion, if any, on First Amendment interests. As a general proposition, *amici* suggest that when *private* parties share *private* information on condition that such information not be made public, and where exchange of such information is essential to an activity supported by sound public policy, the First Amendment should not protect publications in violation of the confidentiality agreement.

Furthermore, despite the strong antipathy to prior restraints, *amici* believe that no constitutional purpose would be served by prohibiting injunctive relief and by permitting instead a damage remedy for violation of the confidentiality agreement. Here, unlike many other "prior restraint" cases that have come before the Court, this book has already been published and, therefore, the injunction is limited to identifiable material, and does not apply to speech that has not as yet occurred. Thus, the preliminary injunction differs from a damage remedy only in that the preliminary injunction was entered before a full hearing on the merits. But, unlike other prior restraints invalidated by this Court on the grounds of procedural inadequacy, the present injunction was issued only after an adversary proceeding before a state court. On the basis of this procedure, and in view of the fact that if a preliminary restraint had not been imposed subsequent relief would have been meaningless since money could never compensate respondent for the devastating assault on her privacy and dignity, the injunction *pendente lite* should be affirmed.

ARGUMENT

I. THE WRIT OF *CERTIORARI* SHOULD BE DISMISSED

A. This Court Lacks Jurisdiction.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(3) which applies to "*final judgments or decrees* rendered by the highest court of a state in which a decision could be had. . . ." (Emphasis supplied.) The general rule, announced long ago, for determining finality is:

> "[A] decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis I.M.&S. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28 (1883).[6]

The purposes underlying the finality requirement were recently noted by this Court:

> "(1) it avoids piecemeal review by federal courts of state court decisions;
>
> (2) it avoids giving advisory opinions in cases where there may be no real 'case' on 'controversy' in the sense of Art. III;
>
> (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 159 (1973).[7]

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[6] See also *Gospel Army* v. *City of Los Angeles*, 331 U.S. 534 (1947); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964).

[7] See also *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 123-24 (1945); *Catlin Trustees* v. *United States*, 324 U.S. 229 (1945). See generally Crick, "The Final Judgment as a Basis for Appeal," 41 Yale L. J. 539 (1932); Boskey, "Finality of State Judgments Under the Federal Judicial Code," 43 Colum. L. Rev. 1002 (1943).

To effectuate the last two of these policies when reviewing temporary or preliminary injunctions curtailing speech, the Court—while according due regard to the fact that the matter enjoined is speech—has held that a judgment is final when it appears "that the issuance of a permanent injunction upon termination of these . . . proceedings will be little more than a formality." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n. 1 (1971); see *Local 438 Construction and General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542 (1963).[8] In such circumstances, delay of this Court's review fosters comity since the decision on the permanent injunction may not present a constitutional issue. Delay also enables this Court to avoid rendering an advisory opinion since the issues presented by a permanent injunction may be different from those presented by the preliminary injunction.

In deciding when a permanent injunction is "mere formality," the Court usually inquires: (1) whether the state courts "applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case," *Organization for a Better Austin* v. *Keefe*, *supra*, 402 U.S. at 418 n. 1; (2) whether "there is any indication that the injunction rests

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[8] In *Curry*, the Court relied primarily on the fact that the state courts were without jurisdiction even to decide whether an injunction should issue since jurisdiction was preempted under the National Labor Relations Act. Hence the state court's finding of jurisdiction could be viewed as final. Here, it is clear that the state courts had jurisdiction to entertain the petition for a preliminary injunction.

This Court also reviewed a temporary injunction in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). In that case, however, since the temporary injunction remained "in effect until further modification by the court and since there is no indication that any modification . . . will be forthcoming," the judgment was treated as final. *Id.* at 312 n. 5. Here, on the other hand, the preliminary injunction remains in effect only for the duration of the litigation.

on a disputed question of fact that might be resolved differently upon further hearing," *id.*; and (3) whether "petitioners . . . have [any] defense to offer other than their [constitutional] contentions," *id.* at 421 (Harlan, J., dissenting). Application of each of these tests to the present case demonstrates that the issuance of a permanent injunction will be significantly more than a "formality."

First, it appears likely that "a more rigorous" standard will be applied before a permanent injunction is granted and sustained. The Appellate Division—the highest state court to issue an opinion—explicitly stated that respondent had "made a sufficient showing to warrant the granting of the *provisional remedy* requested." [App. at 105 (emphasis supplied).] And, of course, the state's high court affirmed without opinion. In light of the novelty and complexity of the issues, it would seem that the state appellate courts—proceeding on a necessarily skimpy record—simply manifested the traditional deference given to a trial court's issuance of a preliminary injunction *pendente lite*.[9] Surely such deference would not be accorded a permanent injunction against publication of a book. See also p. 27, *infra*.

Second, as petitioners themselves assert, "there are hotly contested factual issues" still largely unresolved.

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[9] See *Maas* v. *United States*, 371 F.2d 348 (D.C. Cir. 1966), which also involved a preliminary injunction against a book. The Court of Appeals affirmed the injunction on the ground that:

> "It must be borne in mind here that this is not an appeal from a final judgment after a trial or from a summary judgment finally disposing of the case. It is here on the District Court's grant of a prohibitory preliminary injunction aimed at preserving the *status quo*. Appellate courts quite generally view the grant or denial of a preliminary injunction as resting in the sound discretion of the trial court and limit determination on appeal to whether there has been 'abuse of trial court discretion,' 'clear error,' 'violation of the rules of equity,' or 'improvident granting.'" *Id.* at 351.

(Pet. Br. at 21.) Most particularly, the issues of whether respondent is identifiable and whether she consented to publication are in dispute. Indeed, the trial court appears to have found, on the basis of the affidavits, that disguise was adequate. Although the intermediate appellate court, when imposing a preliminary injunction, reversed this determination, it is not at all clear that such a finding would be reversed if supported by a full factual record with testimony on the issue of identifiability and expert evidence on the question of whether this book meets professional standards for disguise. Similarly, petitioners vigorously claim that respondent consented to publication. (App. at 30-34.) This issue, too, might be resolved differently after a full factual hearing.[10] And, while the opinions below are not explicit regarding the relationship between respondent's cause of action and the issues of disguise and consent, it seems obvious that if respondent is found to have consented to publication she will not prevail on the permanent injunction. Similarly, it is at least questionable whether she could prevail if the courts found that she could not be identified.

Finally, petitioners have also raised a non-constitutional equitable defense. They contend that respondent knew about the planned publication for several months, but nonetheless delayed instituting legal action to petitioners' detriment, and is therefore guilty of laches. (App. at 41-43.) The opinions granting the preliminary injunction did not address this issue; there is no indication, however, that it will not be fully explored before a permanent injunction issues. If successful, the defense of laches would remove the constitutional issues raised by an injunction.

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[10] The trial court found as a matter of law that consent had to be written; that legal conclusion, however, was not discussed on appeal. Thus, it is not clear that the lower court's ruling will eventually be affirmed.

There is yet another purpose underlying the finality requirement—avoidance of piecemeal review, see page 13, *supra*—that would be furthered by a finding of no jurisdiction at this time. The courts below have not even addressed the question of damages for publication in violation of the confidentiality agreement. That question is also likely to raise First Amendment issues since, if damages are granted, the state will be imposing a penalty for what petitioners claim is the exercise of their constitutionally protected right of speech. See Pet. Br. at 28-36; *cf. Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (damage remedy for tortious invasion of privacy raises constitutional issues). However, even if a damage remedy should raise issues of constitutional dimension, these issues are not identical to the First Amendment issues presented by the instant injunction since the prior restraint doctrine is inapplicable to a damage remedy. Thus, review of the injunction at this time might not resolve all of the constitutional issues raised in this case and the Court might be required to consider the case twice, even though the issues would arise out of the same facts and, to some degree, present similar constitutional questions. Such a result clearly undermines the policy of discouraging piecemeal review.

In sum, each of the three rationales supporting the finality requirement would be frustrated by review at this time. Moreover, in this case, in contrast to *Organization for a Better Austin* v. *Keefe*, *supra*, there are no strong countervailing reasons for overriding the purposes of § 1257's finality requirement since the present injunction has not had the same kind of "marked impact on petitioners' First Amendment rights." *Id.* at 418 n. 1; *cf. Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1 (1965) (Goldberg, J., in chambers). In *Keefe*, the petitioners were involved in a dispute regarding real estate practices, and they were enjoined from distributing "literature of any kind" and "from picketing." 402 U.S.

at 417. Due to the timeliness of the issue and the breadth of the injunction in *Keefe*, the temporary injunction had a significant effect on First Amendment rights. Here, however, the injunction is limited to a single book which the authors themselves have kept from publication for more than ten years. Since the subject matter is not governmental or political, see pp. 39-42, *infra*, and since it does not bear on an issue requiring an immediate public decision, First Amendment interests would not suffer significantly if publication were delayed solely for the time needed to reach a final resolution of the merits of this case.[11]

B. The Writ Was Improvidently Granted.

Even if the Court should find that it has jurisdiction to decide this case, it should nonetheless exercise its discretion to dismiss the writ of *certiorari* as having been improvidently granted. The same kind of concerns that dictate a finding of no finality also strongly suggest that the writ should be dismissed.[12]

While no fixed rules govern when this Court will dismiss a writ as having been improvidently granted, typical instances include cases where the record is not "suffi-

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[11] It is also relevant to note that the injunction here—unlike the injunction in *Keefe* which had been in effect for three years—has been in effect for just over one year. That time has been consumed exclusively by petitioners' two appeals in the state courts and their effort to secure *certiorari* in this Court. Instead of seeking these appeals petitioners could have accepted the limited injunction, which allowed publication in the scientific community, and pressed for a speedy resolution of the issue of a permanent injunction. While petitioners clearly had a right to these appeals, they should not also be allowed to complain about the length of time for which the preliminary injunction has been in effect.

[12] In several cases the writ has been dismissed as improvidently granted on the ground that "no final judgment has been entered." *Fox Film Corp.* v. *Muller*, 294 U.S. 696 (1935). See *Whitus* v. *Georgia*, 385 U.S. 545 (1967).

ciently clear and specific to permit decision of the important constitutional questions involved. . . ." *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968)[13] or when the issues are not "presented with sufficient clarity. . . ." *Kimbrough* v. *United States*, 364 U.S. 661 (1961), or when there are "[a]mbiguities in the record as to the issues sought to be tendered," *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960).

At the outset it is important to reiterate the significance of the main issue presented for review—the resolution of a possible conflict between the important policy of encouraging citizens to seek mental health care by insuring confidentiality, and the right to publish a book of alleged scientific worth. To decide this issue the Court should obviously seek a record that is clear on the law and the facts; instead it now has a record that is inadequate and confused.

First, the record below does not make clear which New York law justifies the present injunction. There are no fewer than *five* possible theories implicit in the holdings of the state courts. Each theory, when weighed against the interests protected by the First Amendment, presents *different* issues of constitutional dimension.

The trial court appears to have rested its ruling on a theory of common law contract between private parties: "[T]he defendants obtained the information from plaintiff, under the implied, if not express, agreement that confidence would be respected. . . ." (App. at 83.) The intermediate appellate court—the highest state court to issue an opinion in this case—did not explicitly discuss the common law contract theory advanced by the trial court. Instead, it ruled:

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[13] See also *Johnson* v. *Massachusetts*, 390 U.S. 511 (1968); *Smith* v. *Mississippi*, 373 U.S. 238 (1963); *Wainwright* v. *City of New Orleans*, 392 U.S. 598 (1968) (Fortas, J., concurring).

"Defendants also assert that no cause of action for a breach of confidentiality exists on the facts pleaded and that plaintiff cannot obtain relief under Civil Rights Law §§ 50 and 51, since those sections are inapplicable to a truthful, educative, nonfiction book on the subject of mental illness. Defendants' manner of advertising and selling the book, however, would seemingly contradict their avowed purpose of solely advancing scientific knowledge. In light of the expanding recognition of invasion of privacy actions (*cf. Griswold* v. *Connecticut*, 381 U.S. 479; *Roe* v. *Wade*, [410 U.S. 113]; *Nader* v. *General Motors Corp.*, 25 NY2d 560), and in view of the confidentiality accorded the physician-patient relationship, we believe that plaintiff has alleged a cognizable claim for relief and has made a sufficient showing to warrant the granting of the provisional remedy requested."

This holding begins by relying on the state privacy statute [14] as the source of respondent's protection, and

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[14] The New York privacy statute, N.Y. Civil Rights Law §§ 50, 51, provides:

"§ 50. *Right of privacy.*

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. *Action for injunction and for damages.*

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

suggests that the way in which the book has been advertised places it within the statute's proscription.[15] The privacy statute explicitly provides for injunctive relief.[16]

The appellate court goes not to speak of the "expanding recognition of privacy actions" and cites to three cases. The first two cases are decisions of this Court announcing a *constitutional* right to privacy. Thus, the appellate court could be suggesting that the state's failure to protect respondent's privacy in these circumstances would constitute a deprivation of a constitutional right.[17]

The third case cited by the appellate court—*Nader* v. *General Motors Corp.*—is a decision of the New York Court of Appeals applying the District of Columbia's common law of torts which protects personal privacy. New York is one of the few jurisdictions that has not established tort protection for privacy infringements.[18] However, there have been strong suggestions that if faced with the question today, New York, like most states, might well find a privacy cause of action ground-

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[15] Breaches of doctor-patient confidentiality have previously been found actionable under this statute. See *Feeney* v. *Young*, 191 App. Div. 501, 181 N.Y.S. 481 (1920); *Griffin* v. *Medical Society of New York*, 7 Misc.2d 549, 11 N.Y.S.2d 109 (1939).

[16] See note 14, *supra*.

[17] See *Gallela* v. *Onassis*, 353 F. Supp. 196, 232 (S.D. N.Y. 1972), where, in an analogous situation involving an invasion of privacy, the court held that "[t]he act of a court—even the entry of a judgment denying relief—is state action within the meaning of the Fourteenth Amendment. . . . Hence, the denial of relief in this case—relief essential to vindicate a basic human and constitutional right—would itself violate the Constitution." The Second Circuit did not address this issue on appeal. *Gallela* v. *Onassis*, 487 F.2d 986 (2nd Cir. 1973). See also *Nader* v. *General Motors Corp.*, 31 App. Div.2d 392, 298 N.Y.S.2d 137 (1969), aff'd 25 N.Y.2d 560, 255 N.E.2d 765 (1970).

[18] See *Roberson* v. *Rochester Folding-Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

ed in tort law.[19] Thus, the court's citation to *Nader* may indicate the possibility that in this case, when considering the issues of a permanent injunction or damages, New York might reconsider its 1902 decision barring tort recovery for privacy invasions.

Finally, the appellate division concluded its holding by relying on "the confidentiality accorded the physician-patient relationship." Thus, the court could be resting on the common law contract theory of confidentiality relied upon by the trial court (the appellate court styled respondent's claim as one for "*breach* of confidentiality"). The court could also be suggesting that the injunction was issued pursuant to the state's statutory medical licensing provisions which regard disclosure of confidences as "unprofessional conduct" justifying license suspension or revocation.[20] Under New York law a private cause of action is frequently implied from a prohibitory statute

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[19] See *Gallela* v. *Onassis*, *supra* 487 F.2d at 995 n. 12 ("Although the New York courts have not yet recognized a common law right of privacy, if we were required to reach the question, we would be inclined to agree with the court below that when again faced with the issue the Court of Appeals may well modify or distinguish its 1902 holding in Roberson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), that 'The so-called right of privacy has not as yet found an abiding place in our jurisprudence.' There is substantive support today for the proposition that privacy is a 'basic right' entitled to legal protection, Time v. Hill, 385 U.S. 374, 415, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (Fortas, J., dissenting), nor can the 'power of a State to control and remedy such intrusion [even] for news gathering purposes . . . be denied.' *Id.* at 404, 87 S.Ct. at 550 (Harlan, J., concurring and dissenting). Privacy essential to individual dignity and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights."). See also *Gallela* v. *Onassis*, *supra*, 353 F. Supp. at 227-31.

[20] See New York Education Law §§ 6509-6511 and regulations issued pursuant thereto, N.Y. Code of Rules and Regulations, Vol. 8, § 60.1. See also N.Y. Civ. Prac. Law and Rules § 4504(a) providing a testimonial privilege for communications between a doctor and patient.

such as this one.[21] Moreover, there are dicta in several lower court New York cases supporting a private cause of action based on the licensing statute.[22] Other courts have also followed this approach.[23]

Faced with these five potential justifications—common law contract, state licensing statute, common law tort privacy, state privacy statute, and constitutional privacy right—in support of the holdings of its lower courts, the New York Court of Appeals simply affirmed the injunction without opinion. Hence this Court, if it does not dismiss the writ, will not have clear guidance as to which of these statutory, common law, or constitutional provisions did in fact justify the present injunction. Moreover, the competing interests, and, correlatively, the nature of the constitutional issues raised by these different theories are largely distinct:

1. Contract theory.—If the injunction is viewed as a means in aid of specific performance of a private-party, doctor-patient contract not to disclose confidences, then the threshold question is whether state enforcement of such a contract provides sufficient "state action" to trigger a constitutional issue. Compare *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Even assuming there is sufficient state action, it is not at all clear that the same First Amendment standards—including the prior restraint doctrine—are applicable. When two *private* parties agree to share *private* information, and confiden-

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[21] See *Gallela* v. *Onassis*, *supra*, 353 F. Supp. at 227, and cases cited therein.

[22] See *Clark* v. *Geraci*, 29 Misc. 2d 791, 208 N.Y.S.2d 564 (1960). Cf. *Felis* v. *Greenberg*, 51 Misc. 2d 881, 273 N.Y.2d 288 (1966). See generally, Annotation, Physician's Tort Liability, Apart From Defamation, for Unauthorized Disclosure of Confidential Information About Patient, 20 A.L.R.3d 1109 (1968).

[23] See, *e.g.*, *Simonsen* v. *Swenson*, 104 Neb. 224, 177 N.W. 831 (1920); *Abelson's, Inc.* v. *New Jersey State Board of Optometrists*, 5 N.J. 412, 75 A.2d 867 (1950).

tiality is a condition of the exchange, the First Amendment considerations are distinctly different from when the *state* itself seeks to suppress information. See Section II B, *infra*.

2. Private remedy based on licensing statute.—This approach would raise somewhat different constitutional issues since the obligation on the doctor would be imposed by the state rather than by an agreement between private parties. Nevertheless, the intrusion on First Amendment interests would still be relatively slight since the speech that would be curtailed would turn on the fact of a confidential relationship, rather than on the content of the speech involved. In effect, curtailment of this book could be viewed as a small part of a broad state effort—including licensing provisions and a testimonial privilege—to enforce a legitimate concern for confidentiality in the doctor-patient relationship. Thus, this case would be similar to other cases involving implementation of government policies that have the occasional effect of curtailing speech. Compare *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969) (labor relations statute); *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418 (1911) (labor statute); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (equal employment opportunity provisions).

3. Statutory or tort privacy protection.—Both of these approaches protect, to a large degree, the *content* of the disclosure as distinguished from the *nature* of the confidential relationship. Either approach would raise substantial First Amendment questions that have only been briefly touched upon by this Court. In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the closest case on point, a magazine had published an article about the opening of a play based on a true event that involved plaintiff and his family, who were mentioned by name in the article. Some of the statements in the article were fic-

tionalized. Plaintiff sued for damages under the New York privacy statute. The Court ruled that plaintiff could recover only if the fictionalizations were made "with knowledge of [their] falsity" or in "reckless disregard of the truth." *Id.* at 388. Thus, implicitly, the Court held that no recovery could be had for truthful revelations of the kind in issue. However, the Court went on to note that under the New York statute, damages might be allowed where:

> " 'Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.' Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (C.A.2d Cir.), cert. denied, 311 U.S. 711 (1940). . . . *This case presents no question whether truthful publication of such matter could be constitutionally proscribed.*" *Id.* at 383 n. 7. (Emphasis supplied.)

Hence, if respondent's remedy is grounded purely in statutory or tort privacy protection this case would present significant constitutional questions affecting a major body of privacy law.[24]

4. Constitutional privacy.—If respondent's relief was based on a constitutional claim of privacy, this case would require resolution of two competing constitutional interests. Initially, of course, it would raise the issue of

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[24] This Court has agreed to hear another case this Term that raises some of these same issues. *Cox Broadcasting Corp.* v. *Cohn*, 415 U.S. 912 (1974) (constitutionality of state statute prohibiting disclosure of names of rape victims). See generally, Nimmer, "The Right To Speak From *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy," 56 Calif. L. Rev. 935 (1968); Franklin, "A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact," 16 Stan. L. Rev. 107 (1964); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?" 31 Law & Contemp. Prob. 326 (1966); Bloustein, "Privacy, Tort Law and the Constitution—Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?" 46 Tex. L. Rev. 611 (1968).

state action either in the sense, discussed above, see note 17, *supra*, of a court failing to enter a judgment protecting a basic right, or in terms of whether the state's licensing of doctors constitutes sufficient governmental involvement. Compare *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (no state action in liquor licensing). And, if the state action hurdle were surmounted, the question would then be whether this sort of privacy is within the constitutional spectrum.[25]

Not only are the opinions below unclear as to the source of respondent's legal protection, but they also fail to make explicit the relationship between respondent's cause of action and the issues of consent and disguise. The constitutional issues presented might be different depending on the state law regarding disguise and consent. (For example, the harm from publication is obviously different when the subject is not identifiable.) And, moreover, the courts below seem to hold somewhat inconsistent views on the issues of disguise and consent. The trial court, while *granting* a limited injunction, appears to have found that the effort to disguise respondent's identity was adequate. See note 27, *infra*. The Appellate Division, however, without even acknowledging the trial court's finding or discussing the issue, simply held that the disguise was inadequate. Similarly, the findings on consent are not sufficiently clear. The trial court held that written consent was required; the Appellate Division stated only that consent was insufficient in this case.

A review of the factors relevant to the questions of jurisdiction and discretion to dismiss the writ, make clear that there should not be review by this Court at

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[25] See *Doe* v. *Bolton*, 410 U.S. 179, 194 (1973). See also *Roe* v. *Ingraham*, 480 F.2d 102 (2d Cir. 1973) (Friendly, J.) ("Should the constitutionally protected zone of privacy be extended beyond the area already recognized, the individual's interest in keeping to himself the existence of his physical ailments and his doctor's prescription for them would lie rather close in the continuum.").

this time. The courts below were faced with a case raising novel legal issues and presenting difficult factual disputes. Full resolution of such a case would obviously have required at least several months. Thus, the courts below were obliged to make an *expedited* preliminary determination solely on the basis of the book and the affidavits by the parties. As a result, that determination was accompanied only by abbreviated opinions, which themselves serve to illustrate the preliminary nature of the injunction. Indeed, the irony in petitioners' argument before this Court is that it relies chiefly on the claim that the record below is inadequate to support a prior restraint. (Pet. Br. at 20-28). But it is precisely that inadequacy which demonstrates that the instant injunction was necessarily preliminary in effect as well as in name, and that this Court consequently lacks jurisdiction to review it.

II. AN INJUNCTION BASED ON A PRIVATE CAUSE OF ACTION FOR BREACH OF THE CONFIDENTIALITY OWED BY PSYCHOTHERAPIST TO PATIENT IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT.

If, notwithstanding the arguments advanced in Part I of this brief, the Court finds it necessary to reach the merits of the preliminary injunction, it is *amici's* position that, on the record as it now stands, the injunction should be affirmed. *Amici* believe that a case study such as the instant one, consisting of an extensive presentation of the treatment of an identifiable person, and published without adequate consent, offends professional ethics, public policy, the agreement of confidentiality, and the patient's right to privacy. Furthermore, an injunction prohibiting distribution of such a book is not barred by the First Amendment.

A. Respondent Did Not Consent to Publication and She Is Identifiable.

Petitioners claim that "insofar as [the issues of consent and identifiability] have been resolved at all, they have been largely resolved in favor of petitioners." (Pet. Br. at 21.) On the contrary, we submit that the only fair reading of the record is that there was no consent and that respondent is identifiable.

1. *Respondent Did Not Consent to Publication.*

Both the trial court and the Appellate Division explicitly found that consent was legally insufficient and the Court of Appeals affirmed the decision of the Appellate Division. Hence, the state courts uniformly resolved this issue in respondent's favor.[26]

2. *Respondent Is Identifiable.*

On the question of whether respondent can be identified by people reading the book, petitioners refer only to the ruling of the trial court (Pet. Br. at 5 n. 3);[27] they

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[26] Petitioners rest their claim of consent largely on an allegation, denied by respondent, that while in treatment respondent consented to publication. (Affidavit of Roe and Poe, App. at 30-34.) *Amici* note that there are significant problems in insuring that consent received during the course of treatment is voluntary, since at that time, the patient is unusually dependent on the doctor, and may feel unable to resist the doctor's wishes. See generally, Office of Science and Technology, *Privacy and Behavioral Research* 18-23 (1967). On rare occasion, the inherently coercive nature of the treatment relationship may be sufficiently neutralized so that consent may be validly obtained during treatment. But there is no evidence in this case that the consent allegedly given during therapy took place under such neutralized circumstances; on the contrary, there are indications that it was not so received. See, *e.g.*, *In Search of a Response*, Henry section at 438 ("Who do you think you are, writing a book? . . . My life has been wrecked by you, you lousy stinking analyst. The treachery of it to make such a book. . . . You are a mad scientist.").

[27] The trial court stated that the steps taken to disguise respondent's identity "reasonably meet the usual standards for such

fail to mention the holding of the appellate court to the opposite effect:

> "The claimed justification for publication, resting on the alleged consent of plaintiff and *the attempt to disguise her identity* does not provide a sufficient valid basis for denying the [preliminary injunction]." [App. at 104 (emphasis supplied).]

Although this ruling is less specific than might be desired, *amici* submit that the only reasonable reading of this key sentence is that the Appellate Division reviewed the record, and reversed the trial court's ruling on identifiability. The question of whether disguise was adequate depended only on a reading of the book and the identifying characteristics as discussed in the parties' affidavits. Thus the appellate court was in the same position to make this determination as was the trial court. In essence, the issue of disguise is a legal question—how identifiable need respondent be?—that may be resolved by reviewing the book.[28] The New York Court of Appeals affirmed the decision of the Appellate Divi-

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disguising," and concluded that the book "would [not] identify plaintiff as the patient to someone who did not already know plaintiff was the patient." (App. at 83-84.) Nevertheless the court granted a limited injunction against distribution. One way to reconcile this apparent contradiction between the court's finding on identifiability and the court's decision to issue an injunction is to read the court's statement on identifiability to mean that respondent could not be identified unless someone already knew she was a patient of Dr. Roe's. (See Pet. Br. at 5 n. 3.) If this were true, respondent would still be identifiable to a large number of people since many people are likely to know that Dr. Roe was her psychiatrist. Hence, even the trial court's findings could suggest that disguise was insufficient.

[28] Indeed, it would be grossly unfair to respondent, even for a permanent injunction, to require that she introduce testimony of people claiming they were able to identify her from the book. Respondent is seeking to keep this book from friends and colleagues. That purpose would be frustrated if she is required to have such people read the book and testify as to whether they could identify her.

sion, *not* the trial court. This Court therefore should assume that respondent is identifiable.

This reading of the record is also supported by a review of the book at issue, which itself is a part of the record. The book reveals that respondent's son was an autistic child with an unusual talent for music; that respondent's husband had two sons from a former marriage, that he was Jewish, went to Harvard Law School, dropped out and became a writer, and, that later in life he completed law school, became an attorney, was divorced from respondent, and remarried a female attorney. The book also discloses respondent's age, the fact that she was Jewish, that her first husband died, that her father attempted suicide and that respondent herself was a practicing psychotherapist. Given all this information plus the name of respondent's doctor—Dr. Roe did not publish under a pseudonym—it seems clear that respondent would be readily identifiable to a number of people.[29] This is particularly true because respondent is also a therapist, and therapists often reveal their psychiatrists' names to their colleagues.

Thus, contrary to petitioners' assertion, this book does not satisfy "the usual professional standards for disguising the patient's identity—the standards that have been evolved over the years by the profession itself. . . ." (Pet. Br. at 30.) Professional standards, in *amici's* view, require that if a case study is ever to be published without consent there must be no reasonable likelihood that the subject can be identified.[30] Clearly the book at issue fails to meet such a standard.

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[29] See Affidavit of Gloria Bley Miller claiming that she read only a few pages in a bookstore and, although she did not know that respondent was a former patient of Dr. Roe's, she "immediately realized that the book was exclusively about [respondent], and her son, and her former husband." (App. at 65-66.)

[30] See generally, Slovenko, *Psychotherapy, Confidentiality, and Privileged Communication* 64 (1966) ("the public use of identifying characteristics of any individual [is prohibited]").

B. A Publication in Violation of the Psychotherapist-Patient Agreement of Confidentiality Is Not Constitutionally Protected Speech.

Amici further submit that if this Court proceeds to the merits of this case the most reasonable reading of the opinions below—and the narrowest ground on which to rest the injunction—is that a patient has a right of action when a doctor violates his agreement to keep therapeutic communications confidential.[31] Such a right of action has been previously recognized in New York,[32] and has been accepted by almost every state that has considered the issue.[33] The basis for this action rests in

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[31] Petitioners' brief appears confused on the question of whether New York recognizes such a cause of action. At one point it states that the courts below "implicitly recognize that there is no common law cause of action in New York for breach of doctor-patient confidentiality. . . ." (Pet. Br. at 21 n. 19.) Later, however, petitioners concede: "It is apparent that the New York courts have found in this case . . . that a patient does have a cause of action for alleged breach of confidence by a doctor." (Pet. Br. at 29.)

In any event, the opinions below indicate that the New York courts rested their holdings, at least in part, on a recognition of a common-law action for breach of confidentiality. The trial court explicitly stated: "When confidential information is learned, in confidence, under a contract that it shall not be disclosed, I think an injunction will lie to restrain the unauthorized disclosure." (App. at 83.) The Appellate Division, while also referring to New York Civil Rights Law, § 50 and 51, and the right to privacy, specifically mentioned a "cause of action for a breach of confidentiality" as a legally sufficient basis for the relief granted. (App. at 104-105.)

[32] See, *e.g.*, *Felis* v. *Greenberg*, 51 Misc.2d 881, 273 N.Y.S.2d 288 (1966); *Clark* v. *Geraci*, 29 Misc.2d 791, 208 N.Y.S.2d 564, 567 (1960) ("The cause should . . . be recognized . . . because the duty of secrecy is implied by our statutory law and widely conceived in the doctor-patient relationship.").

[33] See, *e.g.*, *Hammonds* v. *Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); *Hague* v. *Williams*, 37 N.J. 328, 181 A.2d 345 (1962); *Berry* v. *Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958); *Simonsen* v. *Swenson*, 104 Neb. 224, 177 N.W. 831 (1920); *Smith* v. *Driscoll*, 94 Wash. 441, 162 Pac. 572 (1917). See generally, Annotation, 20 A.L.R. 3rd 1109 (1968); Note, Extrajudicial

the common understanding, shared by patient and doctor alike, that a doctor will not disclose confidential communications. All doctors since antiquity have sworn to uphold the Hippocratic Oath which provides:

> ". . . whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret. . . ." [Reproduced in Katz, *Experimentation with Human Beings* 311 (1972)].[34]

And, as the court in *Hammonds* v. *Aetna Casualty & Surety Co.*, 243 F. Supp. 793, 801 (N.D. Ohio 1965), aptly noted, "[a]lmost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence." [35]

Truthful Disclosure of Medical Confidences: A Physician's Civil Liability, 44 Den. L. J. 463 (1967); Note, Action for Breach of Medical Secrecy Outside the Courtroom, 36 U. Cinn. L. Rev. 103 (1967); Note, 11 Villanova L. Rev. 662 (1966); Note, 79 Harv. L. Rev. 1723 (1966). But see *Quarles* v. *Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965). Even in *Quarles*, however, the court stated that there might be an action based on contract in cases where the patient compensates the physician. See *id.* at 215 Tenn. 657-58, 389 S.W.2d 252.

[34] See also Section 9 of the American Medical Association Principles of Medical Ethics:

> "A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community." Opinions and Reports of the Judicial Council (1969).

The caveat regarding "the welfare of the individual or the community" applies to matters such as reporting communicable diseases. See generally Note, "Medical Practice and the Right to Privacy," 43 Minn. L. Rev. 943 (1959).

[35] In terms of the constitutional issues presented for review, this Court need not concern itself with whether the cause of action is

Thus, although many courts, as in the opinions below, refer to the patient's "right of privacy" as the interest being protected in actions for breach of doctor-patient confidence, the cause of action is far more narrowly limited than the usual tort action for invasion of privacy. Unlike the real estate broker in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), or the subject of the magazine article in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the patient claims no right to be free generally of adverse or embarrassing publicity; she claims only a right to have her physician respect the oath and agreement of confidentiality.

The rationale supporting this cause of action was eloquently expressed in *Hammonds* v. *Aetna Casualty & Surety Co.*, *supra*, 243 F. Supp. at 801-802:

> "When a patient seeks out a doctor and retains him, he must admit him to the most private part of the material domain of man. Nothing material is more important or more intimate to man than the health of his mind and body. Since the layman is unfamiliar with the road to recovery, he cannot sift the circumstances of his life and habits to determine what is information pertinent to his health. As a consequence, he must disclose all information in his consultations with his doctor—even that which is embarrassing, disgraceful or incriminating. To promote full disclosure, the medical profession extends the promise of secrecy referred to above. The candor which this promise elicits is necessary to the effective pursuit of health; there can be no reticence, no reservation, no reluctance when patients discuss their problems with their doctors. But the disclosure is certainly intended to be private. If a doctor

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styled a "contract" remedy or a "tort" remedy under state law. The important point is that the remedy is based on an *agreement*—be it express or implied—that the doctor will not disclose confidences learned in therapy. See Group for the Advancement of Psychiatry, Report No. 45 at 104 (1960).

> should reveal any of these confidences, he surely effects an invasion of the privacy of his patient. We are of the opinion that the preservation of the patient's privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well."

This legal duty furthers a very important public policy to encourage early and preventive medical intervention. Without an assurance of confidentiality patients will be less willing to seek medical assistance. This is particularly true in psychotherapy because it usually requires extensive disclosure of extremely private matters.[36]

In view of the legal protection offered doctor-patient communications, *amici* submit that the instant book should not be considered "speech" entitled to the protection of the First Amendment. When a *private* person shares *private* information with another person on condition that such information not be disclosed, and where the exchange of such information is essential to an activity supported by sound public policy, the Constitution should not protect violations of that agreement even though such violations take the form of a book.

We start from the position that only the most compelling reasons can justify the violation of an agreement that is essential to the functioning of an important public policy. Indeed, there should be important reasons given before *any* agreement may be disregarded with impunity. This is especially true when someone relies on the agreement and shares information which, but for the agreement, would not have been shared. In such circumstances the harm from disclosure is likely to be significant.

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[36] See *Taylor* v. *United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) ("Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he can not help him."). See also pp. 35-38, *infra*.

To understand the importance of these factors in the psychotherapist-patient context requires some understanding of how the therapeutic process functions.[37] People usually enter intense psychotherapy and especially psychoanalysis because they have deep-seated conflicts and impairment of functioning, usually accompanied by substantial pain and suffering, which limit their ability to work effectively or to have fully satisfying relationships with other people. To alleviate these conflicts, the therapist asks his patient to abandon "rational thought," to allow everything to enter his mind, and to verbalize it as soon as it appears. In this manner, the roots of the conflict—usually the unconscious infantile wishes that are repressed—begin to surface. And, according to Freud, "[i]f a [hysterical, phobic or obsessional idea] can be traced back to the elements in the patient's mental life from which it originated, it simultaneously crumbles away and the patient is freed from it." Freud, "The Interpretation of Dreams," in 4 *Standard Edition of the Complete Psychological Works of Sigmund Freud* 100-101 (1958). As a result of this process the patient is required to communicate:

> ". . . feelings and attitudes which are unacceptable to the patient and others[,] . . . attitudes considered asocial or anti-social by the community. The unconscious is a storehouse of a lifetime's sinful wishes (and every man in varying degrees is a combination of Dr. Jekyl and Mr. Hyde)." Slovenko, *Psychotherapy, Confidentiality and Privileged Communications* 47 (1966).

While disclosure of this material to a psychiatrist may be necessary for effective treatment, if it is revealed to

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[37] Not all therapeutic techniques are the same, nor do they all require the same kinds of disclosures. The techniques described in the text are those based on the therapeutic process developed by Freud. Such techniques were used in respondent's treatment.

one's friends or loved ones, it may destroy their love or trust: "In a world where men are not gods, . . . to know all is not to understand and forgive all." Freund, "Privacy: One Concept or Many," in Pennock & Chapman, eds., *Privacy* 196 (1971).[38] Indeed, psychiatrists are required to undergo painstaking training so that they can listen to such revelations without expressing shock or disapproval, or becoming disturbed themselves by such disconcerting material. It is hardly likely that one's friends and loved ones will react the same way to disclosure of a personality "completely at variance with the patient's everyday functioning personality." Slovenko, *supra* at 47.

Furthermore, dissemination of such massive amounts of extremely private information about a patient is likely to cripple his or her ability to function in society. To be effective and remain emotionally stable people must adopt different roles and postures in different circumstances.[39] Our ability to maintain these different roles depends, in turn, on our ability to control what others know about us.[40] In short:

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[38] See also Fried, "Privacy," 77 Yale L.J. 475, 485 (1968):

> "There are thoughts whose expression to a friend or lover would be a hostile act, though the entertaining of them is completely consistent with friendship or love. That is because these thoughts, prior to being expressed, are mere unratified possibilities for action. Only by expressing them do we adopt them, choose them as part of ourselves, and draw them into our relations with others."

[39] For an extensive discussion of the subtleties and nuances in these processes, see Goffman, *The Presentation of Self in Everyday Life* (1959); *Encounters* (1961); and *Behavior in Public Places* (1963).

[40] See Jourard, "Some Psychological Aspects of Privacy," 31 Law & Contemp. Prob. 307 (1966) ("The wish for privacy expresses a desire to be an enigma to others or, more generally, a desire to control others' perceptions and beliefs vis-a-vis the self-concealing person."). See also, Gross, "Privacy and Autonomy" in Pennock & Chapman, eds., *Privacy* 173 (1971).

> "Every person lives in several different worlds, and in each his mode of response may—indeed must—be different. The roles of father, husband, clerk, good neighbor, union leader, school board chairman, candidate for office, solicitor of funds for the local church, call for different responses. The right to privacy includes the freedom to live in each of these different roles without having his performance and aspirations in one context placed in another without permission." Office of Science and Technology, *Privacy and Behavioral Research* 8-9 (1967).[41]

Thus, failure to enforce confidentiality will have two highly unfortunate effects. First, it will deter patients from seeking therapy or from being sufficiently candid to allow for effective treatment. The nature of the material communicated to the doctor makes the risk of public disclosure too great for the patient to accept. Judge Luther Alverson has aptly noted:

> "It is extremely hard for [patients] to bring themselves to the point where they are willing to expose the dark recesses of their minds to the psychiatrists; often patients have undergone therapy for a year or more before they begin to reveal anything significant. . . . It would be too much to expect them to do so if they knew that all they say, and that all the psychiatrist learns from what they say,

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[41] Professor Fried also claims that this sort of disclosure will destroy a person's ability to develop the most basic human relationships. Both love and friendship, he argues,

> "involve the voluntary and spontaneous relinquishment of *something* between friend and friend, lover and lover. The title to information about oneself conferred by privacy provides the necessary something. To be friends or lovers persons must be intimate to some degree with each other. But intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital we spend in friendship and love." Fried, "Privacy," 77 Yale L.J. 475, 484 (1968).

may be revealed to the whole world. . . ." [Speech before the Connecticut Mental Health Ass'n, June, 1968.)[42]

Second, disclosure will also have a devastating impact on the individual whose most intimate fantasies and thoughts are shared with the public, which will include loved ones, friends, and colleagues. Some of respondent's psychiatric communications—see the examples cited at note 3, *supra*—would have a catastrophic effect if, for example, they were disclosed to her son.

In view of the important interests protected by the agreement of confidentiality,[43] a violation of that agreement should be protected by the First Amendment only in the most compelling circumstances. Here, there is no such justification.

First, the speaker, of course, has waived his right to speak since he has agreed to maintain confidentiality. Thus, the First Amendment interest at stake is the public's right to *know*, and not the speaker's right to *publish*.

Next, it is important to note that the failure to enforce confidentiality agreements will eliminate the source from which the speech in question derives. For example, if patients cannot be assured absolute confidentiality, they will refuse treatment. Without treatment,

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[42] See also Group for the Advancement of Psychiatry, Report No. 45 at 92 ("There is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment"); Katz, "Levels of Confidentiality in the Psychoanalytic Situation," 20 J.A.M.A. 162-166 (1972); Ewalt & Farnsworth, *Textbook of Psychiatry* 299 (1963).

[43] In order to protect these interests, most states, despite the constitutional interest in a fair trial, have granted doctors a testimonial privilege exempting them from compelled testimony based on information learned in the course of treatment. *E.g.*, N. Y. Civ. Prac. Law & Rules § 4504(a); see generally Rule 504 of the *Proposed Rules of Federal Evidence* promulgated by this Court providing for a "psychotherapist-patient" privilege.

there will be fewer case histories from which to learn and, accordingly, less scientific information to share. Thus, by protecting speech the Court would, in part, be evaporating the source of the scientific information it sought to protect.

Finally, and perhaps most significantly, when private parties agree to share private information on condition that it not be divulged there is no compelling First Amendment interest in permitting disclosure. The decisions of this Court have made it absolutely clear that the primary purpose of the First Amendment was to eliminate "the Government's power to censor the press . . . *so that the press would remain free to censure the Government.*" *New York Times Co.* v. *United States*, 403 U.S. 713, 718 (1971) (opinion of Black, J.) (emphasis supplied). *See New York Times, Inc.* v. *Sullivan*, 376 U.S. 254, 276 (1964) (First Amendment prohibits restraint "upon criticism of government and public officials."). See generally Kalven, "The New York Times Case: A Note on The 'Central Meaning of the First Amendment,'" 1964 Sup. Ct. Rev. 191; Meiklejohn, "The First Amendment Is An Absolute," 1961 Sup. Ct. Rev. 245.

When private parties agree to limit publication of private information this paramount purpose of the First Amendment is not undermined. First, the state has no interest in regulating the *content* of the speech; it simply seeks to enforce the private agreement and to encourage the conditions necessary for promoting a desirable relationship. Second, when people limit private speech, the speech curtailed does not pertain to the government. Thus, like the scientific speech involved in the present case, such speech is clearly not "at the very center of the constitutionally protected area of free discussion," *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966); see *Mills* v. *Alabama*, 384 U.S. 214, 218. Third, the state

adjudicates only the rights of private parties. Justice White recently noted that the constitutional issues presented when a "private [party] enforc[es] a private right" by injunction are "distinct" from those arising out of "the Government's request for an injunction against publishing information about the affairs of Government." *New York Times Co.* v. *United States, supra*, 403 U.S. at 731 n. 1.[44] This past Term, for example, the Court adopted a less stringent constitutional standard for defamation of *private* parties than the one applicable to *governmental* figures. Compare *New York Times, Inc.* v. *Sullivan, supra*, with *Gertz* v. *Robert Welch, Inc.*, —— U.S. ——, 94 Sup. Ct. 2997 (1974).

In sum, the First Amendment interests[45] at stake when private parties share private information on condition that it be kept confidential are insufficient to overcome the substantial interests protected by enforcement of the confidentiality agreement. Indeed, this past Term the

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[44] See also *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931):

> "Nor are we now concerned with questions as to the extent of authority to prevent publication in order to protect *private rights* according to the principles governing the jurisdiction of courts of equity." (Emphasis supplied.)

[45] Nor in assessing these First Amendment interests should the Court give credence to petitioners' wholly unsupported assertion that "if the decision below is permitted to stand, the impact upon medical writing will be direct, immediate, and severely deleterious." (Pet. Br. at 36). *Amici* believe that the enforcement of the confidentiality agreement will deter publication of only a small number of case studies. Non-psychiatric case histories will be largely unaffected since "the configuration of the body can [usually] be discussed without anyone recognizing the patient." Slovenko, *supra* at 64. Moreover, even psychiatric case histories are not likely to be significantly curtailed. Very few are book length expositions concerning a single person or family. Rather most studies reported in professional journals (see Pet. Br. at 30 n. 23) contain only a small fragment—a description of a dream or fantasy, for example—from the treatment of a particular individual. Thus, the likelihood of identification is usually negligible. Even when more extensive

Court gave implicit approval to these principles when it upheld an injunction against the disclosure or use of trade secrets by former employees of a corporation who had signed agreements not to disclose such secrets, without pausing to consider whether the injunction unconstitutionally abridged the employees' freedom of speech. *Kewanee Oil Co.* v. *Bicron Corp.*, —— U.S. ——, 94 S. Ct. 1879 (1974). See also *E. W. Bliss Co.* v. *United States*, 248 U.S. 37 (1918); *E. I. DuPont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100 (1917). Petitioners seek to distinguish the trade secret cases on the ground that "it is difficult to detect any First Amendment interest which is served by disclosure of the types of information customarily involved in trade secret cases." (Pet. Br. at 26.)[46] If by this statement petitioners mean that trade secrets have no social value as ideas, they are plainly mistaken. Indeed, this Court in *Kewanee Oil* referred to the type of ideas protected by trade secret law as having "an important part to play in the technological and scien-

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presentations are used, the patient, particularly if he thinks he is not likely to be identified, will sometimes consent to publication. See, *e.g.*, Laing & Estherson, *Sanity, Madness and the Family* viii (1964) ("Our greatest debt is to the persons, patients and family members, whom this book is about, who so generously consented to being studied, and to the results of our research being published."); Laing, *The Divided Self* 10 (1965) ("All of those whom I have referred at any length have given their willing consent to this publication. Names, places and all identifying details have been changed."). And when consent is not forthcoming, there is still the possibility that the scientific worth of the case can be presented in a different type of publication without identifying the patient.

[46] Petitioners also assert that trade secret cases are distinguishable because disclosure of secret technological or commercial information "would ordinarily be harmful without regard to whether the owner of the information is identified," while the patient in this case "can only be harmed if readers of the book can recognize her." (Pet. Br. at 26.) This distinction, which has no bearing in light of the facts of this case, also seems clearly irrelevant in terms of the First Amendment interests at stake in trade secret and in doctor-patient confidentiality cases.

tific advancement of the Nation." —— U.S. at ——, 94 S. Ct. at 1892. The reason why court enforcement of trade secret clauses in employee contracts does not run afoul of the First Amendment is that the restriction, unlike the restrictions in the law of libel or invasion of privacy, does not generally proscribe speech based on its content or its effect. Rather it simply defines the duty of one private party to another with respect to the disclosure of specific information, disclosed on condition that it remain confidential. The same rationale underlies those injunctions which have been issued by courts against the publication, even by the recipient, of private letters, *Peay* v. *Curtis Publishing Co.*, 78 F. Supp. 305, 309 (D.D.C. 1948); *Baker* v. *Libbie*, 210 Mass. 599, 97 N.E. 109 (1912).[47]

Accordingly *amici* submit that a proper regard for First Amendment freedoms does not require this Court, through mechanical invocation of the doctrine against "prior restraints" of expression, to impose special constitutional strictures upon the elements of plaintiff's cause of action—either by demanding a heavier burden of proof than that normally required to support equitable relief under state law, or by following petitioners' novel suggestion to create a new standard of care ("knowing or reckless disregard") in all actions for breach of doctor-patient confidentiality. Since the confidentiality agreement is between private parties seeking to curtail dissemination of private information, no constitutional interests require this Court to ignore the confidentiality agreement and the important purposes it serves, and to find the speech at issue protected under the First Amendment.[48]

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[47] See generally, Note, "Personal Letters: In Need of a Law of Their Own," 44 Iowa L. Rev. 705 (1959). Cf. *Estate of Hemingway* v. *Random House*, 23 N.Y.2d 341, 244 N.E.2d 250 (1968).

[48] Indeed the Fourth Circuit has recently enforced by way of an injunction limiting publication an agreement of confidentiality imposed by the government on employees of the CIA. *United States*

C. No Valid Constitutional Purpose Would Be Served By Permitting a Damage Remedy But Prohibiting Injunctive Relief.

While *amici* believe that the speech at issue should be outside the First Amendment's protection, a possible accommodation between the competing claims presented in this case might lead the Court to permit a private damage remedy for violation of the confidentiality agreement while prohibiting an injunction on the basis of the "heavy presumption" against the validity of prior restraints. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). *Amici* submit that such an accommodation would serve no important constitutional purpose, and would undermine the confidentiality agreement and inflict great harm on respondent.

The principal objection to prior restraints is that they deter or suppress protected expression, as well as speech that may legitimately be proscribed: "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973). This effect may occur either because of the *form* of the restraint, or the *procedure* by which it is entered. In the former case, the restraint —usually in the form of an injunction against certain types of expression, see *Organization for a Better Austin* v. *Keefe, supra; Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931)—acts not against a particular existing

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v. *Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). While such a case is clearly distinguishable from the instant case in terms of the First Amendment considerations at stake, it is noteworthy that the Court *still* found the secrecy agreement to be valid and enforceable. See also *Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969) cert. denied, 398 U.S. 960 (1970).

publication but against expression that has not yet occurred and thus cannot be tested in its context and setting and be judged with assurance to be unprotected. In the latter case, though the publication in question may already be in existence and subject to judicial determination as to whether it is protected or unprotected, the danger is that the procedure—whether it be a non-judicial licensing scheme, *Freedman* v. *Maryland*, 380 U.S. 51 (1965), or a preliminary judicial restraint based only on *ex parte* representations, see *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 195 (1968)—may result in the suppression for an extended time of speech which ultimately is found to be protected by the First Amendment.

When examined as to form, it is clear that the injunction in this case does not pose the dangers typical of prior restraints. The book in question is specifically identifiable and has, in fact, already been published and given a limited circulation. Thus, the present injunction is "couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate," *Carroll* v. *President and Commissioners of Princess Anne*, *supra*, 393 U.S. at 183; see *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, *supra*, 413 U.S. at 390. Indeed, in view of the fact that the instant book has been published "the operation and effect of the [injunction] in substance," *Near* v. *Minnesota*, *supra*, 283 U.S. at 713, is no different from a subsequent restraint. In each circumstance, distribution of the book may continue until some form of judicial relief is granted. Then, if an injunction is issued, continued distribution will result in summary contempt. If, on the other hand, a damage remedy is granted, continued distribution will result in the imposition of additional damages since the legal issue between the parties will have been previously resolved. Similarly, if the subsequent restraint had been a criminal sanction, further

distribution would result in additional penalties.[49] See *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957); Freund, "The Supreme Court and Civil Liberties," 4 Vand. L. Rev. 533, 537-39 (1951).[50]

Thus, because the book has been published, the injunction in this case is totally dissimilar to the injunction in *Organization for a Better Austin* v. *Keefe*, *supra*, which enjoined the organization "from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the City of Westchester, Illinois," on the ground that previous publications by the organization had invaded the privacy of a real estate broker. 402 U.S. at 417. It likewise has little common with the injunction in *Near* v. *Minnesota*, *supra*, which, on the basis of previously published material judged by the

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[49] Another distinction, applicable only to a subsequent criminal penalty, is that an injunction may be issued by the court alone, while under *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), a criminal conviction can only be rendered by a jury. *Cf. Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 447 (1957) (Brennan, J., dissenting). To the extent that this distinction is of constitutional relevance, it is important to note that the constitution does not require a jury trial in a state damage action, such as the one that would be involved in the present case.

[50] The only other decision of this Court known to *amici* that concerned an injunction against identifiable material, and that did not involve the adequacy of the procedures used, is *New York Times Co.* v. *United States*, *supra*. In that case—which spawned nine different opinions—three members of the six-man majority relied primarily on the fact that Congress had "not authorized the injunctive remedy," 403 U.S. at 740 (opinion of White, J., joined by Stewart, J.); see *id.* at 740-48 (opinion of Marshall, J.), and not on the distinction between a prior restraint and a subsequent penalty. Moreover, at least another two members of the majority also appear to have eschewed this distinction by relying on the fact that there is "no room for governmental restraint on the press," *id.* at 720 (opinion of Douglas, J., joined by Black, J.), whether it be by a criminal sanction, a damage remedy, or an injunction.

state courts to be libelous, totally suppressed continued publication of further issues of the newspaper.[51]

Ultimately, then, respondent's argument rests not on the distinction between injunctive relief and a damage remedy, but rather on the fact that the relief here was a *preliminary* injunction issued before a complete trial on the merits. However, if a preliminary injunction—necessarily based on a brief showing—had not been entered, respondent would have been denied all meaningful relief since a subsequent injunction, after extended dissemination of the book took place, would be a useless remedy. And, even if the *record* may be viewed as somewhat abbreviated and confused, the *procedures* employed were constitutionally sufficient. The preliminary injunction was entered only after "a judicial determination in an adversary proceeding," *Freedman* v. *Maryland*, *supra*, 380 U.S. at 58, before a state judge whose determination was upheld by two appellate courts in expedited proceedings. Hence, the likelihood of unjustified suppression of protected speech is far less than it was in *Marcus* v. *Search Warrants*, 367 U.S. 716 (1961), where wholesale seizure of books was permitted pursuant to a warrant secured *ex parte* and issued on probable cause, or *Carroll* v. *President and Commissioners of Princess Anne*, *supra*, where an injunction was issued solely on the basis of *ex parte* representations, or *Freedman* v. *Maryland*, *supra*, where an appointed censor decided whether to license allegedly obscene films. In short, if ever a *preliminary* restraint against publication was valid, it is the present one.

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[51] Petitioners argue that in *Near* the Court was also concerned with the use of an injunction to restrain continued dissemination of issues that had already been circulated. (Pet. Br. at 14.) While the *Near* Court did not explicitly address this issue, this Court has subsequently made clear that the injunction in *Near* was invalidated because it prohibited "dissemination of *future* issues of a publication because its *past* issues had been found offensive," *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 445 (1957) (emphasis supplied).

CONCLUSION

For the foregoing reasons, *amici* submit that the writ of *certiorari* should be dismissed, or, in the alternative, that the decision of the New York Court of Appeals upholding the issuance of the preliminary injunction should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1446

JOAN ROE, PETER POE, AND COE PRESS, INC.,
Petitioners,

v.

JANE DOE,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND TO APPEAR *PRO HAC VICE*

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

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MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND TO APPEAR *PRO HAC VICE*

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Amici Curiae, the American Psychiatric Association, the American Psychoanalytic Association, and the American Orthopsychiatric Association, respectfully move the Court for leave to participate in oral argument in the above entitled case, and further respectfully request that Paul Richard Friedman be permitted to appear *pro hac vice* to present oral argument on their behalf. The following reasons are submitted in support of this motion:

1. *Amici Curiae* filed with this Court a motion for leave to submit a brief *amici curiae* in the above-mentioned case, which was granted on October 21, 1974.

2. As indicated in *Amici's* brief in this case, *Amici* organizations represent more than 25,000 mental health professionals, primarily psychiatrists, who are concerned with the care and treatment of those in this country who need mental health assistance. As is set forth more fully in *Amici's* brief, unless patients in psychoanalytically-oriented psychotherapy are guaranteed confidentiality, this therapy cannot be successful, and patients will be unwilling to seek the psychotherapeutic treatment necessary for restoration of their mental health.

3. *Amici* also have a keen interest in the advancement of scientific learning through the publication of case studies. The case study is a unique method of presentation because it allows for detailed explication of therapeutic techniques in the context of real, rather than hypothetical, patient responses. Commencing with Freud, great contributions to our knowledge of mental processes have resulted from this form of presentation.

4. Should this Court decide to rule upon the merits at this time, *Amici* have valuable expertise which is relevant to the resolution of the conflict between the assurance of confidentiality required for effective psychotherapy and the ability to propagate ideas and further scientific knowledge through publication. Although *Amici* support respondent on the merits in this case, their legal analysis differs from respondent's in a number of important respects. *Amici* recognize the vital importance both of insuring confidentiality and of advancing scientific knowledge through the publication of case studies, and seek to assist the Court in resolving the conflict between these two interests so as to further each of them to the greatest extent possible.

5. However, *Amici* submit that because of the fundamental interests at stake and in view of the incompleteness of the record below, this Court should dismiss the writ of *ceritorari* either because the preliminary injunction issued below is not a final judgment as required for this Court's jurisdiction under 28 U.S.C. § 1257, or on the grounds that the writ of *certiorari* was improvidently granted. Neither petitioner nor respondent have addressed these important jurisdictional issues in their briefs.

6. Since *Amici* have raised jurisdictional issues which neither of the parties has addressed, they request that an additional fifteen minutes be granted so that they may participate in oral argument without utilizing the time presently allotted to the parties. Respondent has rejected *Amici's* request to share respondent's allotted time, but support this motion for leave to participate in oral argument with separate time.

7. *Amici* mental health organizations expressly request that Paul Richard Friedman present oral argument on their behalf.

8. Mr. Friedman graduated from Yale University Law School in June, 1970, and has been Managing Attorney of the Mental Health Law Project since 1972. He was admitted in 1972 to practice before the Courts of the District of Columbia and the United States Courts of Appeals for the District of Columbia Circuit and the Fifth Circuit. He is also a research candidate in training at the Baltimore-District of Columbia Institute for Psychoanalysis.

9. Mr. Friedman has been primarily responsible for the preparation of *Amici's* brief, and is the counsel most thoroughly acquainted with the cases, statutes and policies which support *Amici's* legal arguments.

Respectfully submitted,

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I, Joseph Onek, hereby certify that a copy of the foregoing Motion was mailed, postage prepaid, on this — day of October, 1974, to:

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MOTION FILED

SEP 25 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1446

JOAN ROE, PETER POE, and COE PRESS, INC.,

Petitioners,

—v.—

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETS *AMICI CURIAE*, AND BRIEF *AMICI CURIAE*

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Time, Inc. v. Hill, 385 U.S. 374 (1967).....14,17,18
Wiseman, et al. v. Commonwealth, No. 621, October Term 1969; pet. for certiorari denied, 398 U.S. 960 (1970); pet. for rehearing denied, 400 U.S. 954 (1970).....7,9

Miscellaneous:

Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890)..... 17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1446

JOAN ROE, PETER POE, and COE PRESS, INC.,

Petitioners,

-v.-

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, *AMICI CURIAE*

The respondent having denied consent to the filing of an *amici curiae* brief, the

American Civil Liberties Union and the Civil Liberties Union of Massachusetts hereby move for leave to file the appended brief amici curiae.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated solely to defending the liberties guaranteed by the Bill of Rights. The Civil Liberties Union of Massachusetts is a statewide affiliate of the American Civil Liberties Union confining its membership and activities to the Commonwealth of Massachusetts. The issues in this case involve a conflict between two important civil liberties principles: on the one hand, the right of an individual to protection of that individual's privacy and right to be left alone, and on the other hand, the press's and author's freedom to disseminate ideas and information and the public's right to know. In addition, the Civil Liberties Union of Massachusetts is currently involved in an effort to dissolve an outstanding injunction by the highest state court in Massachusetts against the public showing of a film vitally affecting a topic of great public importance within and beyond the boundaries of Massachusetts, and an opinion by this Court in the instant case might well affect the ultimate outcome of the CLUM's efforts. Accordingly, the purpose of this brief is to suggest principles for the resolution of the competing rights and interests in this case in such a way as to preserve important constitutional values in this and future cases

where First Amendment and privacy claims are in seeming conflict.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movants

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICI CURIAE

Interest of Amici

The interest of amici is set out in the preceding Motion For Leave To File.

A R G U M E N T

Introduction

This case involves an apparent or potential conflict between two sets of rights, each of which is, to different degrees, entitled to protection. On the one hand, the Petitioners here -- a psychiatrist and lay psychotherapist turned authors for purposes of writing a case history, and their book publisher -- are entitled to the protections afforded by the First and Fourteenth Amendments to the Constitution. On the other hand, modern notions of the right of privacy would seem to afford the Respondents -- a patient of the Petitioners and a subject of the case history that has been suppressed -- some degree of protection. Involved also are the public's right to know, and the public's right to benefit ultimately from advances in medical knowledge and in the state of the psychiatric art which result largely from the publications of case histories such as is involved here. Finally, to the extent that the development of enlightened public opinion regarding psychiatric illness and the treatment thereof are influenced by the widespread dissemination and public availability of such case histories and similar psychiatric literature, then to that extent current and future generations of emotionally disturbed people (already a very substantial segment of the population) would benefit from a

correct resolution of this case.

In addition, the Civil Liberties Union of Massachusetts ("CLUM") has recently adopted a position that is expected shortly to result in an effort to dissolve a seven year old injunction issued by the courts of Massachusetts, prohibiting the public distribution and exhibition of a film entitled "Titicut Follies". A short discussion of the history of this matter is in order to fully explain the CLUM's interest in the case at bar.

The "Titicut Follies" Litigation.

The "Titicut Follies" case involves a documentary motion picture film showing actual events and conditions filmed at the Massachusetts Correctional Institution at Bridgewater, a state hospital and prison for the criminally insane. The film, entitled "Titicut Follies" and made in 1966 by the well-known documentary film-maker Frederick Wiseman, depicted the sordid conditions of that institution, and was banned from distribution or exhibition except to a narrowly limited potential audience consisting of "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity."1/

1/ This language is quoted from the Superior Court's Final Decree After Rescript

The Supreme Judicial Court of Massachusetts imposed the further requirement that if and when the film is shown to such limited, professionally educated and professionally interested audiences, the exhibitor must include in the film for all permited showings "a brief explanation that changes and improvements have taken place in the institution since 1966." Commonwealth v. Wiseman, 356 Mass. 251, 263.

The extraordinary First and Fourteenth Amendment questions presented by such a sweeping prior restraint, based upon asserted private interests and contractual rights perceived by the Commonwealth of Massachusetts and by its Supreme Judicial Court, were presented to this Court in a Petition for Writ of Certiorari,2/ but review was denied, with Mr. Justices Douglas,

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(Massachusetts Superior Court, Equity No. 87538, decree dated and entered July 9, 1969), which follows the opinion and order of the Supreme Judicial Court of Massachusetts affirming the Superior Court's earlier ruling but modifying the decree of that court which would have prohibited any showing of the film whatsoever. Commonwealth of Massachusetts v. Wiseman, 356 Mass. 251, 249 N.E. 2d 610 (1969).

2/ Frederick Wiseman, et al., Petitioners, v. Commonwealth of Massachusetts, et al., Respondents, No. 621, October Term, 1969.

Harlan and Brennan voting to grant review. 398 U.S. 960 (1970). Upon a petition for rehearing, Mr. Justice Blackmun, who had since ascended the Bench, voted with Mr. Justices Harlan and Brennan to hear the case, but since at that point Mr. Justice Douglas did not participate in further proceedings involving the case, a complement of four Justices voting for review was still not achieved. 400 U.S. 954 (1970).

As a result, the general public has been denied the right to see, and Mr. Wiseman has been denied the right to exhibit, an extraordinary film attacking, in the most stark terms, the deplorable conditions at a state "correctional" institution and mental hospital. The film was concededly non-obscene and, since it portrayed actual conditions caught on film, was not false. It was neither on grounds of obscenity nor defamation that the Supreme Judicial Court of Massachusetts prohibited public distribution and exhibition of the film. Rather, that court relied upon a holding that the inmates depicted had a privacy interest in the film's not being shown, and that that interest could be vindicated by the Commonwealth acting as parens patriae. In the course of its opinion, the Supreme Judicial Court noted that "the film gives a striking picture of life at Bridgewater and of the problems affecting treatment at that or any similar institution " Commonwealth v. Wiseman, 356 Mass. 251, 262. The Court goes so far as to note that in 1967 -- the year after Wiseman made his film -- there

were "some improvements in conditions at Bridgewater," including much-needed additions to the custodial and treatment staffs. 356 Mass. at 260, n. 8. Yet the Court held that since "the record does not indicate to us that any inmate shown in the film, by reason of past conduct, had any special news interest as an individual," 356 Mass. at 260-61, and since there were in the film "recognizable pictures of individuals in "naked or in other embarrassing situations," 356 Mass. at 260, and since "valid" releases and consents were not obtained from each and every inmate pictured in the film, injunctive relief was appropriate.3/

3/ The consent issue furnished a sort of "Catch-22" for the Wiseman petitioners. On the one hand, the Supreme Judicial Court professed concern for the fact that Wiseman had not obtained, in writing, consents from each inmate pictured. The Court questioned the validity of those releases Wiseman had obtained, on the ground that such a release would have effect only if "the inmate giving it had seen the film and fully understood how he was to be portrayed." 356 Mass. at 260, n.9. Of course, since all or nearly all of the inmates at Bridgewater were presumptively non compos mentis, none of them could be competent to sign a valid release. Thus, the Commonwealth -- the party most embarrassed by the film's revelations -- would have to decide, as parens patriae for the inmates, whether or not to give such releases. The Court so held

While the Court professed that it gave "no weight to any direct interest of the Commonwealth itself in suppressing the film," 356 Mass. at 259, nevertheless the Court required that whenever Wiseman showed the film to one of the enumerated professional audiences, he inform the audience that conditions have improved at the institution since the film was made. 356 Mass. at 263. Since Wiseman has been unwilling to make such a statement, which he considers to be untrue, he has refrained from showing the film even to limited professional audiences. 4/ Thus, a film of vast educational, social and political potential,

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despite the fact that not a single inmate pictured objected to being filmed, as Wiseman specifically refrained from filming those inmates who did object.

4/ One result of the controversy over the film was the initiation of an emergency review procedure to look into the status of many of the inmates of Bridgewater, many of whom were found to be erroneously or needlessly incarcerated and were released. This action indicates the Commonwealth's sensitivity to criticism even by a suppressed film. One can only speculate on what improvement might have been made in the treatment of the criminally insane in Massachusetts had the film not been suppressed.

as well as artistic merit, 5/ has remained dormant for seven years.

It is this situation that various parties interested in the film and in vindication of First Amendment interests are planning to rectify by legal action to be initiated in Massachusetts. It appears likely that in the case at bar, this Court might well touch upon issues and decide questions which would inevitably have some effect upon the dissolution of the "Titicut Follies" injunction.

5/ The first public showing was at the New York Film Festival at Lincoln Center in New York City on September 28, 1967. It was awarded the first prize as the best documentary film at the Mannheim Film Festival in 1967. National Educational Television wanted to show the film. The then Attorney General of Massachusetts, Mr. Elliott Richardson, found the film to be "impressive" and "powerful" and said at the trial that it "overwhelmed" him. The Supreme Judicial Court apparently recognized that "the seemingly random and somewhat incoherent sequence of scenes" had method to it and was "not likely to confuse seriously interested professional and student audiences" and might be "highly informative to such specialized audiences." 356 Mass. at 262, n.11. Unfortunately, the Court did not credit the general public with such

A PRIOR RESTRAINT SUCH AS APPEARS IN THIS CASE IS VIRTUALLY UNPRECEDENTED AND HAS NO SANCTION FROM OR BASIS IN ANY OPINION OF THIS COURT.

The Petitioners in this case correctly point out in their brief (at 3) that the courts of the State of New York took an "absolutely unprecedented" action in enjoining distribution and sale of "a concededly truthful and non-obscene book, concerning matters of great scientific and medical importance." A similar case, involving a film rather than a book, in Massachusetts, occurred where the Supreme Judicial Court of the State enjoined exhibition to the general public of a concededly non-obscene, truthful film depicting the sordid conditions at a state-run prison and hospital for the criminally insane. See Commonwealth v. Wiseman, 356 Mass. 251 (1969). In both cases, the state courts purported to base their decisions on what they perceived to be a privacy right residing in the persons depicted in the works sought to be published -- in one case the subject of a psychoanalysis, and in the other case the involuntarily confined criminally insane. In both cases the state courts, without denying the existence of a legitimate public concern with the subject matter, nevertheless held that the plaintiffs' private

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abilities to understand and comprehend the artistic methods employed in a fine documentary film.

interests justified the issuance of prior restraint against publication, distribution and exhibition.

Perhaps the most remarkable aspect of the state courts' treatment of the case at bar was the fact that, notwithstanding the lower court's factual finding that the identity of the Respondent was sufficiently disguised in accordance with the standards of the psychiatric profession in writing case histories (A 84-5), she was nevertheless entitled to relief. The trial court judge limited that relief to an injunction against distribution of the book in public, commercial channels, as opposed to channels "reasonably calculated to be addressed to scientific readers," since "the claimed scientific value of the disclosure" outweighs the respondent's right to ban all distribution whatsoever. It appears that the only ground advanced by that court for the partial injunction is that "[w]hen confidential information is learned, in confidence, under a contract that it shall not be disclosed,...an injunction will lie to restrain the unauthorized disclosure." (A-83.)

The Supreme Court, Appellate Division, First Department, citing "the expanding recognition of invasion of privacy actions" and "the confidentiality accorded to the physician-patient relationship" (A-104), broadened the relief to prohibit any and all distribution of the book. The Court of Appeals, most remarkably of all, affirmed without dissent, noting only in the amended

decision that the "prior restraint" doctrine was not violated by the broader injunction (A-128).

To affirm these decisions is to expand the doctrine of prior restraint considerably further than this Court has ever done before. Prior restraint must inevitably rob the public, or some substantial class of persons, of whatever valuable results emerge when a "marketplace of free ideas" is allowed to deal with difficult, controversial, dangerous, or unacceptable social problems, illnesses, and related matters of public interest. Abrams v. United States, 250 U.S. 616, 630 (1919); Time, Inc. v. Hill, 385 U.S. 374, 406 (1967).

This Court has tolerated prior restraints only in the obscenity cases, where the Court has said publication has no public importance and is outside the First Amendment. Kingsley Books, Inc. v. Brown, 354, U.S. 436 (1957). Compare New York Times v. United States, 403 U.S. 713 (1971).

The Respondent in the case at bar would have this Court carve out a new exception to the rigid rule prohibiting prior restraints on publication to include cases in which arguable privacy claims are advanced. The potential abuses of this additional exception are nowhere more clear than in the "Titicut Follies" case. The Supreme Judicial Court of Massachusetts, while treating the issues in more detail than did the New York trial court, nevertheless treated the weighty

First Amendment claims in an equally cavalier manner. The Court admitted the scientific 6/ importance as well as the quality of the documentary film, and even noted that no inmate appearing in the film objected to its exhibition and that the film probably helped the inmates by prompting improvements at the institutions. While it is true that steps were not taken to disguise the faces of inmates pictured therein, the court did not suggest that exhibition would be approved if such steps were taken.7/

6/ The court did not speak to the political importance of the film, although such importance must have been in the court's mind when it insisted in its order that should the film be shown at all to the audiences permitted by the opinion, the exhibitor had to make clear that the conditions (for which the state was obviously responsible) had improved since the making of the film.

7/ There are obviously steps that might be taken by a filmmaker to disguise names, or faces, or persons depicted in a film. Of course, disguising faces might have a detrimental effect upon the ability of the film to make a substantial impact upon the viewer. This whole question never arose, however, in view of the Supreme Judicial Court's failure at any point to inquire into the possibilities of a "less restrictive alternative" to a total ban on showing the film to lay audiences.

This factor, combined with the court's concern that at limited permissible "professional" exhibitions the audiences be informed that conditions at Bridgewater had improved, betrays what appears to be the true interest of that court -- to prevent widespread embarrassment to the government of Massachusetts and its departments of corrections and mental health. Furthermore, the court made no effort to inquire as to whether any of the inmates pictured might have preferred whatever invasion of privacy was entailed by the showing of the film, in exchange for whatever improvement to the institution or enhancement of their chances for release the film might have prompted. There was no evidence that any person shown in the film was incompetent to give knowledgeable consent or to object to his being filmed or to the film's being exhibited. The court merely assumed that none of the inmates could make any judgment as to what was in his best interest, and that only the state could decide that critical question.

Certainly the material involved in the publication in the case at bar, as well as the film "Titicut Follies", involves an even stronger public interest than did the story of James Hill and his family, Time, Inc. v. Hill, 385 U.S. 374. Even a person who involuntarily falls into a situation where a public interest is suddenly created, must suffer some exposure to the public, 8/

8/ "Exposure of the self to others in

provided, of course, that there is no intentional falsification by the publisher. See, e.g., Jenkins v. Dell Publishing Co., 251 F.2d 447 (3rd Cir. 1958), cert. den. 357 U.S. 921; Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890); 9/ Organization for a Better Austin v. Keefe, 402 U.S. 415, 419-20 (1971); Public Utilities Commission v. Pollack, 343 U.S. 451.

While privacy interests are critical, and indisputably in need of protection, prior restraint is not the appropriate vehicle. The individual's right to privacy is indeed a most important right in a civilized society. But the protection of that right should not take the form of the obstruction of the public's right to know. Privacy rights should be vindicated by civil post-publication remedies appropriately limited by doctrines such as that in

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varying degrees is a concomitant of life in a civilized community. The risk of exposure is an essential element in a society which places a primary value on freedom of speech and press." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

9/ "The right to privacy does not prohibit any publication of matter which is of public or general interest." 4 Harv. L. Rev. 26 214.

New York Times Co. v. Sullivan, supra, and Time v. Hill, supra, or by lawsuits designed directly to protect the right to privacy without unduly restricting the public flow of information. Cf. Griswold v. Connecticut, 381 U.S. 479; Roe v. Wade, 410 U.S. 113 (1973); Nader v. General Motors Corp., 25 N.Y. 2d 560.

Prior restraints are particularly odious and inappropriate in cases such as these, since they effectively create a criminal penalty where, in the absence of court interference, only a civil penalty is envisioned. While civil penalties awarded in post-publication suits for libel, invasion of privacy, or breach of contract, would in some cases tend to discourage future free exercise of the right to publish freely (see New York Times Co. v. Sullivan, supra), it is clear that the imposition of criminal penalties in connection with the court's contempt power poses an even greater threat to First Amendment rights. It is said that prior restraint acts against the publication rather than the publisher. By transforming civil penalties into criminal ones, it effectively devastates both. This Court has recently acknowledged that even mere civil damages when awarded in excessive amounts in the form of exemplary damages, have an unduly devastating effect on First Amendment rights. Thus the Court has held that in the absence of liability based on knowledge of falsity or reckless disregard of truth, where the state-imposed standard for liability in libel cases is less

demanding than the rule of New York Times v. Sullivan, supra, or Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), only actual, and not exemplary, damages may be awarded. Gertz v. Robert Welch, Inc., ___ U.S. ___ 42 U.S.L.W. 5123 (1974). See also Mr. Justice Brennan's opinion for a plurality of the Court as well as Mr. Justice Marshall's dissent in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). Indeed, even in cases in which individuals have been found to be hurt (unlike the case at bar and in the "Titicut Follies" case), the Court has foreclosed post-publication damages where there has been substantial public interest in the event and where it was impractical or inappropriate to obtain written releases. Thus individuals were prevented from recovering for publication of personal and embarrassing photographs and information in Kelly v. Post Publishing Co., 327 Mass. 275, 98 N.E. 2d 286 (1951)(fatal accident); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P. 2d 491 (Dist. Ct. App. 1939)(suicide of relative); Jenkins v. Dell Publishing Co., 251 F.2d 477 (3rd Cir. 1958)(death by brutal assault).

There is no justification, in fact or in law, for the prior restraint imposed in this case by the New York Courts. A very heavy burden should be placed upon a party seeking a prior restraint of publication, requiring that in this case the injunction be dissolved. Nor would it be appropriate for the Court in the case at bar to vacate

the order of the New York Court of Appeals and re-instate the lower court order allowing only distribution in "professional" scientific channels. This "solution," which was adopted by the Supreme Judicial Court in Titicut Follies, treats the general public much too shabbily and reflects an elitist philosophy which is foreign to our national thinking. Dissemination of material of vital public interest has never, by edict of this Court, been limited to "educated" audiences. See DeJonge v. Oregon, 299 U.S. 353, 365 (1937); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 684 (1968).10/

This Court has consistently made plain its strong aversion to prior restraints. See New York Times v. United States, supra. Nonetheless, the Court is asked by the Respondent to engraft a new exception to the rule, based on a purported invasion of an individual's privacy.

Such an exception to the prior restraint rule, if adopted by this Court, will emasculate the prior restraint prohibition and inflict a heavy blow to the exercise of First Amendment freedoms. After all, what

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10/ This situation is distinguishable, of course, from a case where a certain "vulnerable" class of persons might be protected from certain material, such as where statutes prohibit dissemination of certain "adult" materials to minors.

do authors write about, and film makers film, if not about people, private individuals who either are public figures, or who are not public figures but might be on their way toward becoming such, or who are entirely unknown but whose life circumstances are of interest to the general public.

The logical result of such a doctrine could easily be a spate of cases such as "Titicut Follies" where the privacy rights of individuals are interwoven with the political concerns of a government, and where the one is used to obfuscate the other. In Commonwealth v. Wiseman, 356 Mass. 251 (1969), there was a relatively shallow intrusion on the privacy of the inmates that was scarcely a fraction of the degree of intrusion and disruption that such an institution inflicted on them each and every day of their incarceration.

A broad rule prohibiting prior restraints in these cases is required. As this Court has noted in a related area, ad hoc balancing by individual judges of the public interest as against privacy rights is an inappropriate if not dangerous approach to the First Amendment. Gertz v. Robert Welch, Inc., ___ U.S. ___, 42 U.S.L.W. 5123, 5129 (June 25, 1974).

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully Submitted,

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September 1974

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1446

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JANE DOE,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

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AFFIRMATION IN OPPOSITION

EPHRAIM S. LONDON
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New York, New York 10022

Counsel for Respondent

(4335)

In The
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AFFIRMATION IN OPPOSITION

EPHRAIM S. LONDON, an attorney

admitted to practice in this Court, states:

1. I am the attorney for the Respondent in this case and make this statement in opposition to the motion of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts for leave to file a brief as amici in support of the Petitioners' position.

2. The motion is opposed because the application is not timely, and because the brief relates primarily to an issue not properly before the Court. It may be added that the brief would be of little help to the Court. The amici suggest at page 14 of their brief that the appropriate remedy for the wrong to Respondent is open discussion in "the market place of free ideas." In this case, the sale of a book by a psychiatrist was enjoined because the book disclosed

intimate details of the patient's life and thoughts confided to the psychiatrist during treatment. We do not understand how the wrong to the patient could be remedied by open discussion of the circumstances of the patient's life or of her treatment by the psychiatrist.

3. Although the motion for leave to file a brief does not make any reference to the fact, the amicus brief is, as stated before, offered in support of the Petitioners' position. The Petitioners' brief was due and was served (after two extensions of time) on August 2, 1974. Under subdivisions 2 and 3 of Rule 42 of the Rules of this Court, the motion for leave to file the proposed brief should have been filed on or before August 2, 1974. The motion was served September 23, 1974. The amici do not offer an explanation of

the late application. They were aware of the proceeding a sufficient time before August 2nd to have completed their brief before that date. The attorney for the Petitioners in this case is one of the counsel for the amicus, American Civil Liberties Union. The American Civil Liberties Union was also aware of this case long before August 2, 1974 because its affiliate, the New York Civil Liberties Union, had been asked to file a brief when the case was on appeal to the New York Court of Appeals. After hearing both counsel, the New York Civil Liberties Union determined that it ought not to intervene in support of the position of the Petitioners or the Respondent. The American Civil Liberties Union reached its decision to intervene without consulting with the attorneys for the Respondent.

4. There would be very little reason to accept the amicus brief even if the motion for leave to appeal had been timely. The amicus brief is concerned primarily with a stated conflict between the right of privacy and freedom of speech or press. (See motion papers at pages 1 to 3.) As set forth in the Respondent's brief (at pages 13 to 15), that question is not properly presented for review in this case.

Dated: September 23, 1974

EPHRAIM S. LONDON

Supreme Court, U. S.
FILED
OCT 4 1974
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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY TO AFFIRMATION IN OPPOSITION

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Attorney for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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JANE DOE,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY TO AFFIRMATION IN OPPOSITION

Petitioners' counsel respectfully submits this reply to the "Affirmation in Opposition" filed by the counsel for the respondent, which was submitted in opposition to the motion of the American Civil Liberties Union (hereinafter "ACLU") and the Civil Liberties Union of Massachusetts (hereinafter "CLUM"), for leave to file a brief amici curiae.

1. Respondent's counsel opposes the receipt of such amici's brief because he disagrees with the position taken therein on the merits. This is no more a justification for objecting than would be the case of petitioners' counsel objecting to the proposed brief amici curiae lodged by the American Psychiatric Association (hereinafter "APA") and others, which generally supports respondent's position. Respondent's counsel argues (page 5) that the ACLU-CLUM brief should not be received because it is "concerned primarily with a stated conflict between the right of privacy and freedom of speech and press", which in his view is not before the Court. It is interesting that the proposed APA amicus brief, which supports respondent's position, clearly acknowledges that that is the very issue which is before the Court (see p. 4, proposed Amicus Curiae Brief of APA, et al.).

2. On page 4 of his "Affirmation", respondent's counsel asserts that petitioners' counsel is "one of the counsel for the amicus, American Civil Liberties Union". This is indeed true. Petitioners' counsel, Marvin M. Karpatkin, is one of four unpaid volunteer general counsel of the ACLU, and is an ACLU cooperating attorney. Respondent's counsel has also been an ACLU cooperating attorney. Petitioners' counsel advises the Court, however, that Mr. Karpatkin did not participate in any way in the deliberation and determination of the ACLU and the CLUM with respect to their participation in this case amicus curiae. Indeed, Mr. Karpatkin was absent from the meeting of ACLU general counsel and legal staff where the case was discussed, and the decision to intervene made, and the minutes of the meeting records both his absence and non-participation. Petitioners' counsel had no

knowledge of CLUM's interest until CLUM's counsel requested petitioners' consent.

3. As soon as it was learned that amicus briefs were in preparation by APA, et al., in support of respondent, and by ACLU-CLUM in support of petitioners, petitioners' counsel, in response to a request for consent by counsel for amici APA, et al., advised counsel, that petitioners would consent to the APA et. al. amicus brief if respondent would consent to the ACLU-CLUM brief. The response of respondent's counsel was negative, and consequently, both groups of amici and the Court had to be burdened with these unnecessary motions.

October 2, 1974

Respectfully submitted,

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MOTION FILED

OCT 29 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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Petitioners,

—v.—

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae
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IN THE

Supreme Court of the United States

October Term 1973

No. 73-1446

JOAN ROE, *et al.*,

Petitioners,

—v.—

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Motion for Leave to File Brief As *Amicus Curiae*

The Authors League of America respectfully petitions for leave to file the annexed brief *amicus curiae*. The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express their views in cases involving rights of free speech and press. Although this appeal essentially involves a narrow issue, raised by a psychiatrist's disclosure of confidential information obtained from her patient, sweeping statements in the opinion below suggest radical new limitations on the First Amendment protection of authors and publishers in general from the restrictive effects of right-of-privacy suits and the threat of such litigation. With a deep concern that the decision of the narrow issue in this appeal should not produce such new restrictions on authors' freedom of expression, The Authors League respectfully applies for leave to file its brief *amicus curiae*.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae

IN THE

Supreme Court of the United States

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JOAN ROE, *et al.*,

Petitioners,

—v.—

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF THE AUTHORS LEAGUE OF AMERICA

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Statements in the opinion below indicate that New York courts would impose new restrictions on the First Amendment protection of authors and publishers from the restrictive effects of right-of-privacy suits and the threat of such litigation. The Authors League is concerned that decision of the narrow issue on this appeal should not produce such new restrictions on authors' freedom of expression.

Summary of Argument

(i) The fundamental issues are whether petitioner-psychiatrist, in publishing her book, violated State regulations prohibiting doctors from disclosing confidential information obtained from their patients; and if so, what forms of relief can be granted.

(ii) Relief cannot be granted under the New York right-of-privacy statute when a plaintiff's name is not used in defendant's book.

(iii) Methods of selling a book cannot deprive an author of protection under the *Time, Inc.* First Amendment standards.

(iv) The First Amendment bars judicial creation of new causes of action for publication of non-defamatory statements.

POINT I

The Regulations of The Commissioner of Education.

Although it affirmed the Appellate Division's order without an opinion, the Court of Appeal's syllabus lays heavy stress on the plaintiff's argument that defendant-psychiatrist's book—containing details of plaintiff's life revealed during her treatment—violated Regulations of the Commissioner of Education (33 N.Y. 2d 902, 903). Under the Regulations, it is unprofessional conduct for a physician to reveal information relating to a patient, when it is obtained in a professional capacity. (Sec. 60.1 (d) [3])

The fundamental issues in this case are whether the petitioner-psychiatrist violated the Regulation when she

published the book; and if so, what forms of relief the court could grant. We respectfully submit that if the Regulation was violated, the First Amendment prohibits the granting of relief in the form of an injunction restraining publication. *Near* v. *Minnesota*, 283 U.S. 697; *Carroll* v. *Princess Anne*, 393 U.S. 175. The First Amendment's bar against injunctive relief is observed in libel suits. The Amendment must be equally protected here.

POINT II

The First Amendment Mandates the Test of "Identification by Name" in Right-of-Privacy Suits.

The Appellate Division did not confine its opinion to the Commissioner of Education's regulations. Even though the plaintiff's name was not used in the psychiatrist's book, the Court concluded that plaintiff also was entitled to relief under New York's right-of-privacy statute (Secs. 50, 51; N.Y. Civil Rights Law). Presumably this interpretation would apply not only to books by doctors disclosing information obtained from their patients, but to all books, plays and films written by authors who are not doctors, and do not obtain their information under the very unique and special doctor-patient relationship.

We submit that the Court's conclusion, which reverses prior interpretation of the statute, imposes a drastic restraint on freedom of expression and is prohibited by the First Amendment. In *Toscani* v. *Hersey*, 271 App. Div. 445, 448 (1946), the Appellate Division held that the privacy statute (Secs. 50, 51), does not grant relief to a person whose name or portrait is not used in the defend-

ant's book, film or play. The Court ruled that relief could not be granted plaintiff who, although not identified by use of his actual name, might be identified by details of description and narration. Applying this rule in a 1965 opinion, the same court denied recovery to the President of a University because a film, which allegedly identified him, "does not use his 'name, portrait or picture', the statutory test of identification (*Toscani* v. *Hersey* . . .)" *University of Notre Dame* v. *20th Century Fox*, 22 A D 2d 452.

We submit that the statutory test of "identification by name" is mandated by the First Amendment. To abandon the test could open the door to "a vast amount of litigation" (*Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 545); and would certainly have a chilling effect on the First Amendment rights of authors, playwrights, publishers, and producers of plays and films.

Western society has survived the "roman à clef" for four centuries. From 17th century French novelists to Proust, Maugham, Huxley and Joyce, authors have intentionally portrayed real people in their works under fictitious names.* A recent study of Ernest Hemingway's first successful novel begins: "In the summer of 1965 I discovered that the Robert Cohen of THE SUN ALSO RISES lived less than a ten minute drive from my home." [Hemingway and *The Sun Set*", by Bertram D. Sarason; Microcard Editions, 1972]. Professor Sarason's book is a detailed study of the real persons who were well known to have appeared as fictitious characters in Hemingway's novel.

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* The New Encyclopedia Britannica: Micropaedia, vol. IX, p. 664; Macropaedia, vol. 13, p. 287 (1974). See also, "Literary Characters Drawn From Life", Earle Walbridge; H. H. Wilson Co., New York, 1936.

To abandon the statutory test of "identification by name" would not only destroy the "roman à clef"; it would also expose countless novelists and playwrights to suits under the statute when they borrowed experiences, traits and characteristics from different people to construct a fictional character. Yet the creation of novels, plays and films would be almost impossible if authors were thus foreclosed from drawing on such material from the real world.

But abandonment of the statutory test of "identification by name" would create the greatest restraint on freedom of expression when authors never intended to portray outraged plaintiffs in their novels, plays, or works of nonfiction. In a population of 203,000,000 Americans, there are bound to be some people whose experiences or characteristics may parallel, to some extent, those of characters or real persons in books, dramas or films. If the statutory test of "identification by name" is abolished, as the Appellate Division opinion suggests, any person claiming to be portrayed could sue for damages under the New York statute —even though he was not identified by name in the offending work, and even though the work did *not defame* him. To thus vastly expand a statute which was intended only to establish a limited right of action (see *Toscani* v. *Hersey*, 271 App. Div. at p. 447), would expose authors and publishers to all of the repressive and inhibiting factors which this Court described in *Time, Inc.* v. *Hill*, 385 U.S. 374, 389; it would encourage the proliferation of "strike" suits against authors, publishers, and producers of films and plays; and it would allow rich and powerful individuals to employ privacy suits as a weapon to suppress books that offend or displease them. (*Cf., Rosemont Enterprises, Inc.*

v. *Random House, Inc.*, 366 F. 2d 303, 311-313 [1966] and *Rosemont Enterprises, Inc.* v. *Random House, Inc. and John Keats*, 294 N.Y.S. 2d 122 [1968]).

POINT III

Advertising and Selling a Book for Profit Do Not Foreclose First Amendment Protection.

In its opinion, the Appellate Division obliquely (and erroneously) suggested that petitioners could not claim protection under this Court's First Amendment standards, set forth in *Time, Inc.* v. *Hill*, because of their "manner of advertising and selling the book." But as other Justices of the same Court correctly stated, films and "books . . . are a constitutionally protected form of expression notwithstanding that 'their production, distribution and exhibition is a large-scale business conducted for private profit' (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501; *Jacobellis* v. *Ohio*, 378 U.S. 184, 187)." *University of Notre Dame* v. *20th Century Fox*, 22 A D 2d 452.

POINT IV

The First Amendment Prohibits Judicial Creation of New Actions for Publication of Non-Defamatory Statements.

In its opinion, the Appellate Division also seems to suggest that the "expanding recognition of invasion of privacy actions" permits courts to create a new class of privacy suits separate from those authorized by the New York statute (as limited by *Time, Inc.* v. *Hill*). We submit the

court erred. The opinions it cites deal with conduct having no relationship to the publishing of books, or production of films or plays. They offer no support for the court's theory that judges can impose such new restraints on freedom of speech and press.

In *Time, Inc.* v. *Hill*, Justice Black (dissenting) warned that if judges "by their own fiat" can create "a right of privacy superior to the right of free press that the Constitution created" then they can create other privileges "that balance away other cherished Bill of Rights freedoms." (at p. 400) Attempts by New York courts to expand the reach of its "privacy" statute demonstrate the soundness of his warning. In 1902, the New York Court of Appeals—with more faith in the First Amendment than its successors have demonstrated—rejected the claim that courts could create a right of privacy. *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 544-5). The Court said that if the Legislature wished to prevent the use of a person's name or portrait in advertising, it could enact a law establishing a limited right, confined to that purpose. This, and this alone, the Legislature did. *Rhodes* v. *Sperry & Hutchinson Co.*, 193 N.Y. 225.

However, New York courts have stretched the statute far beyond that limited purpose. In *Time Inc.* v. *Hill*, a majority of this Court limited, but sanctioned to some extent, that process of judicial legislation. We believe the opinion curtailed First Amendment rights. And we earnestly urge that this Court should not permit any further incursions on those rights. The potential for restraint in this area is much greater than in the area of libel, where there are some guidelines for determining that certain types of state-

ments are defamatory. But almost any *non-defamatory* statement, later held to be false or intrusive on a person's "private life", could at the least subject an author and his publisher to the costs and burdens of defending a "privacy" suit—if courts are permitted to create new rights of action. Authors and publishers would have no meaningful notice, no less "fair notice", of what types of speech are restricted. Such vagueness and ambiguity violate their First Amendment rights. *Winters* v. *New York*, 333 U.S. 507.

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed.

Respectfully submitted.

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